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HIGHWAY TRAILER INDUSTRIES, INC., a Corporation, Plaintiff-Appellant, vs. H. A. LOWTHER, JR., THE LOWTHER CORPORATION, a Corporation, EMPIRE TRUCK LEASING, INC., a Corporation and FRED GARY, Defendants, FRED GARY, Defendant-Appellee.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO, FIRST MUNICIPAL DISTRICT OF THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Highway Trailer Industries, brought this suit in November of 1962 against defendant, Fred Gary, and three other defendants for damages resulting from an alleged conversion of ten trailers belonging to plaintiff. Judgment by default was entered against Gary and against Empire Truck Leasing, the court specifically finding that malice was the gist of the action, and a writ of capias ad satisfaciendum was issued in March of 1964 and served on Gary. Thereafter, he petitioned the court to vacate the judgment and to quash the writ, and by order of September 16, 1965, the court quashed the capias writ, but denied the motion to vacate the default judgment. Plaintiff appeals from the portion of the order which quashed the writ.

A careful review of the procedural chronology is necessary to give the required perspective to the order challenged in this appeal. This task is rendered difficult by the fragmentary character of the record from the Municipal Court which is presented to us on appeal. Plaintiff's complaint, filed November 21, 1962, alleged that pursuant to a lease agreement it delivered ten trailers to the

defendants, the Lowther Corporation and H. A. Lowther, Jr.; that Lowther Corporation then sub-leased the trailers to defendants Empire Truck Leasing and Fred Gary. The complaint further alleged that Lowther Corporation failed to pay the agreed rental; that plaintiffs then demanded the return of the trailers from all of the defendants; and that such demands were refused, constituting a wilful, wanton and malicious conversion of plaintiff's property by all the defendants. Plaintiff alleged damages in the amount of $30,000, and requested a finding that malice is the gist of the action.

Summons was served upon Gary on October 3, 1963, over ten months later. On October 21, Gary entered his pro se appearance. On that date, defendants were ordered to file their answers within ten days, and the case was set for "answer call" for November 12, 1963. Apparently no answers were filed on behalf of either Empire Truck Leasing or Gary, and on November 12, 1963, the court entered judgment by default against these two defendants.

The next three items in the record are notices of motions, none of which are supplemented by copies of the motions themselves or by indications of the disposition thereof by the court. The first, dated November 18, was served by counsel for Gary upon counsel for the plaintiff, and gave notice of a motion to vacate the default judgment. The second was notice of a similar motion served by Gary pro se and dated December 12, 1963. The third, dated December 27, was served by counsel for plaintiff upon counsel for Gary, and concerned a motion to strike the prior two motions on the grounds that no petitions had been attached contrary to the rules of court.

By order of January 8, 1964, pursuant to another motion by plaintiff, the court found Gary and Empire Truck Leasing "guilty

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of tort in manner and form as charged," and that malice was the gist of the action. The court assessed plaintiff's damages at $21,000, and ordered "that execution issue against the body of defendants." Although the order recited that the cause had come on in regular course for trial and that the Court had heard the evidence and arguments of counsel, Gary alleges on appeal that he did not appear on that date, and that only an ex parte hearing was held. In March of 1964, a writ of capias ad satisfaciendum was issued, and Gary was taken into custody by the Sheriff of Cook County. After a hearing on March 17, Gary was released upon filing his personal recognizance bond. Thereafter, the court granted several continuances to Gary for the filing of his motion to vacate the order and his petition in support thereof. The last of these continuances contained in the record set the case for June 26, 1964. The next item appearing of record, Gary's amended petition to vacate the judgment and to quash the writ, was filed on July 8, 1965, more than a year later. The petition alleged that Gary's failure to appear occurred through "administrative inadvertance," that he had a meritorious defense to plaintiff's demand, and that he was never served with summons. Plaintiff then filed an affidavit in opposition to that petition, which alleged that Gary had been grossly negligent in his effort to vacate the judgment orders against him in that he failed to file a petition in support of his motion to vacate until June 14, 1965, and that the court had lost jurisdiction to vacate the order of January 8, 1964. After a hearing on the petition and the affidavit, the court entered the order quashing the writ, but denying the motion to vacate the default judgment. In this appeal, plaintiff challenges the former portion of that order, alleging that plaintiff's petition presented no grounds for quashing the writ

and that the court did so arbitrarily.

We agree with plaintiff that the court did not in any way indicate for the record his reasons for quashing the writ. But at the same time, we must agree with defendant Gary that plaintiff's complaint failed to allege facts which would support the entry of a malice judgment. The only hearings prior to the entry of that judgment appear from the record to be ex parte hearings; once Gary had come into court to present his case against the entry of the malice judgment, the court quashed the writ which was based upon that judgment. A drastic remedy, such as imprisonment for debt, should not be allowed, except upon presentation to the court of facts which reveal that the action is genuinely one in which malice is the gist. Emerson Midwest Corp. v. Slive, 351 Ill. App. 109, 113 N.E.2d 351. On this record, we cannot conclude that the court abused its discretion in quashing the writ.

But viewing the record as a whole, we feel that a mere affirmance of the court's order quashing the writ would not produce a just result either for the plaintiff or for the defendant. Plaintiff would have the benefit of a default judgment without the opportunity to obtain a capias writ to enforce it; and the availability of such a writ was sufficiently important to plaintiff to necessitate this appeal. Defendant, on the other hand, who claims to have a meritorious defense to plaintiff's claim, would be liable under the default judgment and thereby denied the opportunity to defend himself on the merits.

From the record, it appears that defendant Gary filed a timely motion to vacate the default judgment against him. This motion was filed pro se, as was Gary's original appearance in the case. It is clear that Gary did not have an understanding of the

rules and procedures of the Municipal Court; and under such circumstances his interests should have been carefully protected by the trial judge. Yet there is no indication in the record of any disposition by the trial court of Gary's timely motion to vacate. The record indicates that the trial court's first ruling upon this question was some twenty-two months later, when the court quashed the writ, but denied defendant's renewed plea to vacate the default judgment. While the court stated no reasons for the record for either portion of that order, plaintiff's argument in opposition to the petition to vacate was that the court had lost jurisdiction to do so. We conclude that in view of the absence from the record of any disposition of defendant's timely motion to vacate, the court did have jurisdiction to vacate the default judgment in September of 1965. Gary's petition to vacate presented itself to the equitable powers of the trial court; and under all the circumstances we feel it was improper for the court to deny that petition. The petition to vacate the default judgment should have been granted, and under the authority granted us by §92(1)(e) of the Civil Practice Act (Ill. Rev. Stats., ch. 110, §92(1)(e), (1963)), we reverse that portion of the order.

We were informed during oral argument that this case is still pending in the trial court against the other defendants, the Lowther Corporation and H. A. Lowther, Jr. Defendant Gary will therefore have the opportunity to defend himself before a jury on the merits in the same proceeding as the parties who were primarily liable under the lease; and plaintiff will be afforded the chance to establish his right to a capias writ.

The default judgment and special finding of malice entered on January 8, 1964, were erroneous, and are hereby reversed. The

portion of the order of September 16, 1965, which quashed the capias writ is affirmed; but the portion of that order denying the petition to vacate the default judgment is reversed, and the case is remanded for further proceedings not inconsistant with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

KLUCZYNSKI, P.J., and MURPHY, J., concur.

~~Abstract only.~~

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MUTUAL NATIONAL BANK OF CHICAGO, a National Banking Association, as Trustee under the provisions of a trust agreement dated March 30, 1960 and known as Trust No. 3385,

Plaintiff-Appellee,

v.

CITY OF CHICAGO, a municipal corporation,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, COUNTY DEPARTMENT, LAW DIVISION.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered in favor of plaintiff declaring R3 zoning regulations of the Chicago Zoning Ordinance void as applied to the subject premises. Plaintiff seeks an R4 classification, which allows greater density than an R3 classification.

The subject property fronts along the west side of Halsted Street between 91st Street on the north and 93rd Street on the south. It has a depth of 108 feet from Halsted to an alley west of Halsted. Between 91st and 92nd Streets, plaintiff owns all the property except lots 9 and 10. Between 92nd and 93rd Streets, plaintiff owns all the property except lot 2. All the subject property now lies in an R3 General Residence District.

Plaintiff previously erected, on the subject property, nine 2-story, multiple-family dwellings, each building containing four bedroom apartments in conformity with R3 zoning regulations. West of the subject property, between 92nd and 93rd Streets, the area is developed exclusively with single-family residences. All are located in an R2 zoning district. West of the subject property between 91st and 92nd Streets, are single-family homes in the excavation stage and one duplex townhouse. Between 91st and 92nd Streets, across Halsted Street, east of the subject property, are ten or twelve single-family residences and some vacant frontage. Along the streets east of Halsted

Street, the neighborhood is fully developed with single-family residences. Directly across 91st Street to the north, a business use is in the process of being constructed. To the west of the northwest corner of Halsted and 91st Streets are some one story buildings, including a junk yard and a concrete ready-mix operation. Halfway between 91st and 92nd Streets, is a Truck Testing Station, occupying the frontage to the Rock Island Railroad right of way. Located along the west side of Green Street, between 91st and 92nd Streets,is a furniture manufacturing company, a factory, a parking lot and another factory. At the southwest corner of 93rd and Halsted is another vacant lot. South of the vacant lot are several businesses. The west frontage of Halsted Street, between 94th and 95th Streets, is divided into two zoning districts, R3 and B4-1, the latter extending north from 95th Street. Starting north at 94th Street, there are three new 3-flats, followed by a vacant lot and a gasoline station. Between 93rd and 94th Streets, the east frontage of Halsted is improved by a vacant residence and a hardware store at the southeast corner of 93rd and Halsted Streets.

The case was referred to a Master for a hearing and a report back to the trial court. The Master was authorized to complete the reference after the expiration of his term as Master.

During the hearing, Richard J. McKinnon, a City Planner, employed by the City of Chicago and whose qualifications were stipulated to by plaintiff, testified to the uses and zoning of the subject property and other property in the vicinity thereof. He testified that, from the point of view of city planning, the highest and best use of the subject property is development in conformity with the existing R3, General Residence District standards of the Zoning Ordinance. He based this opinion upon the existing uses of adjacent property, which consists primarily of a single-family residential development conforming to the R2, Single-Family Residence District of

the Zoning Ordinance, which allows a lesser density of use than the R3 District density. He also based his opinion on the fact that there is no R4 density use in the immediate vicinity of the subject property. McKinnon also testified that, in his opinion, plaintiff's proposed R4 use, from a planning point of view, would have a depreciatory effect on the surrounding neighborhood, on the homes west of the subject property; that doubling the number of existing buildings on the subject property would create a canyon effect on the Halsted Street frontage between 91st and 93rd Streets; that one 4-flat would follow another with no variation in architectural scheme; that setbacks and side yards would be limited, restricting light and air, a circumstance which, in itself, would have a deleterious effect on the neighborhood in general; that from a planning point of view the depreciatory effect cannot be reduced to money terms; that the adverse effect falls upon the fully developed single-residence district west of the subject property; that an R4 density is not compatible with this area; that there should be an intervening district, such as the existing R3, which has a density half way between the R2 single-family residence district and the plaintiff's proposed R4; that with respect to the people on Green Street, west of the subject property, those people reside in the existing single-family district because of the amenities of a single-family neighborhood. He further testified that an apartment development is not incompatible with single-family uses but that it has to be properly laid out, with a density of use similar to that of the single-family neighborhood; that he could not compare the public benefit from the R3 zoning of the subject property with any loss to plaintiff because he does not know what plaintiff's loss would be; that he did not know what the plaintiff paid for the property or what its worth would be whether developed under R3 or R4 zoning; that the single-family area west of the subject property was developed before 1957; that the primary purpose of the 1957 Amendment of the Zoning Ordinance

was to reduce excess business frontages along section line streets; that in his opinion this is why the subject property was zoned R3 under the 1957 Amendment; and that the location of the subject property on a section line street certainly would affect the use of the property.

John McNamara, a real estate broker, appraiser and builder of 38 years experience on the south side of Chicago, testified on behalf of the City, that the subject property, for use in conformity with the existing R3 zoning, has a value of $125 per front foot; that for the plaintiff's proposed use, the subject property would have a value of $200 per front foot; that the increase in value for the proposed use is because of the greater density of use; that from his 38 years of experience in the real estate business the highest and best use of the subject property is under the present R3 zoning; and that the highest and best use is that in which an owner, under present zoning, can get the most capital out of the property without a depreciating effect on surrounding property.

James F. Messinger, real estate broker and mortgage banker of 30 years experience, testified on behalf of plaintiff that the value of the subject property, considered as unimproved land, for R3 uses, as presently zoned, is about $120 to $125 per front foot; that under R3 zoning 1650 square feet per dwelling unit is required on section line streets; that under R4 zoning only 900 square feet per dwelling unit is required; that in his opinion, if the subject property could be used within the R4 classification, its value would be about $150 per front foot; that in his opinion the highest and best use of the subject property is for multiple-family residences with the R4 classification, basing his opinion upon information given him by a Swedish builder, named Swanson, the morning he testified; that plaintiff proposed to build additional apartments on the space between the existing buildings, allowing about 3,600 square feet for each

building, including those already erected; that this would provide a frontage of slightly under 35 feet for each building with a lot depth of 108 feet; that it is not economically feasible to build only one 4 apartment building on a 66 foot lot, because the cost of the lot per unit is too much; that plaintiff has built such buildings on 66 foot lots but he could have built them on 50 foot lots; that he could have built a 3-flat on a 50 foot lot; that under R4 zoning, plaintiff could construct 8 dwelling units on a 66 foot lot; that in his opinion, plaintiff's proposed development would not depreciate any of the surrounding uses or structures; but rather, he thought, would enhance them; and that he did not think it would have a detrimental effect because plaintiff plans to sell as he constructs.

Richard Samuels, secretary of the Rosewood Corporation, testifying for defendant, stated that the corporation is a developer and seller of homes on the south side of Chicago; that the Rosewood Corporation owns property in the same block as the north parcel of the subject property; that the corporation's property fronts on the east side of Green Street, west of the subject property and extends from 91st to 92nd Streets; that the corporation acquired this land about 6 months previously in different parcels for about $125 per front foot, knowing it was zoned R3; that the Rosewood Corporation plans to develop and sell most of this frontage with single-family residences, with the balance improved with duplex townhouses; that the Rosewood Corporation has already commenced excavating for 2 or 3 single-family residences; that in his opinion plaintiff's proposed use would have a depreciating effect on the Rosewood development because of the resistance of people to moving into more crowded neighborhoods; that Rosewood Corporation is presently a competitor of the plaintiff's beneficiaries; that the corporation's experience with 2 and 3-flats has not always been good; and that in at least one instance the corporation developed some R4 zoned property with single-family residences.

Approximately one dozen owners of single-family residences in the immediate area testified as to their objections to plaintiff's proposed use of the subject property, setting out their fears of the deleterious effect the R4 zoning would have on the use, enjoyment and value of their property. There was testimony that the schools would become overcrowded, crime would be increased and that an additional burden would be placed on the sewer and garbage facilities.

James Norris, publicity staff member of the Southwest Community Organizations, an affiliation of 137 civic, religious and veterans' organizations of the southwest section of Chicago, testified that the buildings already existing on the subject property comply with R3 zoning requirements; that the community affecting the subject property extends from the Rock Island tracks between 90th and 91st Streets on the north to 99th or 103rd Street on the south and from east to west between the Western Indiana Railroad tracks at Eggleston to the Rock Island tracks at Vincennes; that between 90th and 95th Streets from Halsted to Genoa Avenue, most of the uses are homes except on Halsted Street; and that at the present time there are 30 single-family residences built or being built on Halsted Street between 87th and 92nd Streets.

The Master filed a report concluding that the 1957 zoning is invalid, as applied to the subject property, and recommended judgment for plaintiff. The Master overruled defendant's objection to the report. The court approved the Master's report and declared the Chicago Zoning Ordinance, as amended, invalid as not bearing any reasonable relation to the public health, safety, morals, comfort and welfare; in restricting the use of the subject property to the standard set under the R3 classification; and in prohibiting its use for multiple-family dwelling units as provided in the R4 classification.

Defendant's theory of the case is that

(1) the zoning ordinance is supported by a presumption on validity, which plaintiff failed to overcome by clear and convincing proof, in that

(a) the validity of the R3 density restrictions has already been decided as reasonable,

(b) the low density residential uses surrounding the subject property sustains the reasonableness of the R3 density restriction,

(c) plaintiff has not sustained any unusual hardship because of the R3 zoning restriction,

(d) owners of single-family residences have a right to rely on the right of R3 zoning restrictions, and

(2) that plaintiff bought subject property with knowledge of the zoning restrictions, voluntarily improved said property pursuant to those zoning restrictions and designated various "zoning lots" to meet the minimum lot area requirements for the buildings so erected, and thus cannot deny the validity of the existing zoning provisions.

We do not have to consider defendant's second contention in that we feel, in accordance with defendant's first contention, that plaintiff failed to overcome the presumption of validity of the zoning ordinance by clear and convincing proof.

The principle difference between an R3 and R4 General Residence District, is that in an R3 District there shall be provided not less than 2,500 square feet of lot area per dwelling unit, while in an R4 District there shall be provided not less than 900 square feet of lot area per dwelling unit, except that for efficiency units there shall be provided not less than 600 square feet of lot area per unit and for lodging rooms, not less than 450 square feet of lot area per room.

Plaintiff's case depends largely upon the testimony of James Messinger, real estate broker and mortgage banker. Messinger testified that the subject property, as raw land for purposes permitted by the existing R3 zoning, is worth $120 to $125 per front foot, while for plaintiff's proposed R4 use, its value is about $150 per front foot and that in his opinion the highest and best use of the subject property was for multiple-family residences under the R4 classification.

Messinger's testimony, however, is overcome by the testimony of the City's Planning Expert McKinnon, who testified, after reviewing the zoning and uses of the subject property and its vicinity, as follows:

> It is my opinion that the subject property should be developed according to R3 general residence district standard of the Chicago Zoning Ordinance.
>
> I base my opinion on the adjacent property, not only to the west but in the immediate area from Halsted Street west to Genoa, Sangamon. The primary residential development in the area is single-family, conforming to R2, single-family district, which is one step below the R3.
>
> Within the immediate area of the subject property there isn't a comparable density to R4. The closest that I have been able to determine equivalent to R4 would be west of Vincennes Avenue, approximately 89th and Loomis and Laflin, in that area.
>
> Between 92nd and 93rd there is only one building constructed. Between 91st and 92nd, it was my understanding that according to the original complaint that they didn't own Lots 9 and 10, so this would be excluded, and the remaining lots on the frontage between 91st and 92nd, it appears that Lot 1 has been utilized for one four-flat. Lots 2 and 3 have been utilized for two four-flats, and Lots 4 and 5 have been utilized for two four-flats and my estimation was that Lot 8 has been utilized for a four-flat and of course there is a four-flat on Lot 12, so I would estimate that they probably could construct three additional four-flat buildings under the R3 standard of the zoning ordinance.

In Lapkus Builders, Inc. v. City of Chicago, 30 Ill.2d 304, 196 N.E.2d 682 (1964), the court, in sustaining the R3 zoning against a proposed R4 density of use, said at page 309:

> As we have frequently stated, the rules of law applicable to zoning matters have been so often reiterated that no necessity exists to lengthen this opinion by detailing them again. The issue here is as to whether the density restrictions imposed by the zoning ordinance are reasonably related to the health, welfare, morals and safety of the community. The presumption is that they are. (Exchange Nat. Bank of Chicago v. County of Cook, 25 Ill.2d 434.) Unless the proof is sufficient to overcome the presumption and establish that the questioned restrictions are arbitrary or capricious as applied to plaintiff's property, they will be upheld. (Exchange Nat. Bank of Chicago v. City of Chicago, 28 Ill.2d 341.) The general principle of limitation upon intensity of use as embodied in the Chicago Zoning Ordinance of 1957 was upheld by this court in a case quite similar to this. Cosmopolitan Nat. Bank of Chicago v. City of Chicago, 22 Ill.2d 367.

> It is clear that except for the commercial strip along the west side of Kedzie Avenue the general area around the subject property is low density residential in character. Single-family residences of a value of $20,000-$25,000, plus several conforming apartment buildings comprise the dwellings in the area. The fact that the property is bounded on three sides by conforming dwellings, particularly the two proximate multiple-unit apartments, plus the testimony of residents of the area, indicate that those who have already built and settled the area have acquiesced in and relied upon the ordinance. Moreover, the plaintiff has failed to point to a single dwelling in the area of the subject property which does not conform to the density restrictions of the ordinance. . . .

The foregoing principles apply to the case at bar. McKinnon's testimony shows the single-family residential type of low density development to the west of the 1108 foot frontage of the subject property. Messinger's testimony shows that the east side of Halsted Street between 91st and 92nd Street is developed with 10 or 12 new single-family dwellings and that there are more such dwellings on the east side of Halsted between 92nd and 93rd. Norris on cross-examination testified that between 87th and 92nd Streets, there have been built or are under construction 30 single-family residences, a significant trend toward low density residential uses. The next street east of Halsted, Emerald Avenue, is substantially improved with single-family residences from the Rock Island Railroad to 94th Street. The manufacturing uses north of 91st Street and west of Green Street generally conform to the M1-1 Restricted Manufacturing District regulations. They are consistent and compatible with low density residential uses across boundary streets. Directly south of the subject property, the C1-1 District is improved with conforming structures, while the east side of Halsted south of 93rd Street, zoned B4-1 is improved with stores and an older single-family residence. Not a single dwelling in the area of the subject property fails to conform to the density restrictions of the Zoning Ordinance.

Furthermore, in Cosmopolitan Nat. Bank v. City of Chicago, 22 Ill.2d 367, 176 N.E.2d 795 (1961), the court, in sustaining the R3 density restriction against a proposed greater density of use, stressed

the prevailing trend of density in the R3 zoning district in the proximity of the subject property, saying at page 373:

> The record shows that, although the west side of Jersey is zoned R4 and is largely built up with multiple-dwelling buildings, which presumably could not be built on their respective lots if the R3 lot-area restrictions were applicable, the east side of the street [where the subject property was located] is zoned R3 and is for the most part built up with single-family dwellings which comply with the R3 lot-area restrictions. Thus, this is not a case of a glaring miszoning of a specific piece of property. On the contrary, the classification of plaintiff's property is entirely consistent not only with the zoning classification of other property on the east side of Jersey Avenue, but also with the actual construction and use of most of the property there situated. . . .

The foregoing conclusions apply to the case at bar. The R3 zoning of the subject property is not a mis-zoning of the property but on the contrary, is entirely consistent, not only with the zoning classification, but also with the actual uses of other property to the west and to the east and the actual construction already on the subject property and the areas to the east and west thereof. These considerations indicate that in the case at bar the R3 density, or minimum lot area, restriction of the Zoning Ordinance is reasonable and appropriate in application to the subject property.

Furthermore, the Supreme Court of this State has consistently held that of paramount importance in sustaining a zoning ordinance is whether the subject property is zoned in conformity with surrounding existing uses and the zoning classification of nearby property. In Standard State Bank v. Village of Oak Lawn, 29 Ill.2d 465, 194 N.E.2d 201 (1963), the court, in sustaining a low density A-residential zoning against a proposed higher density use, consisting of ten 2-1/2 story apartment buildings each containing 6 dwelling units, said at page 469:

> . . . Of paramount importance is the question as to whether the subject property is zoned in conformity with surrounding existing uses and whether those uses are uniform and established. . . .

and further at page 470:

> This case presents a factual situation in which plaintiff has purchased residentially zoned land near the center of an area with no nearby zoning other than single-family residential. It has been gradually developing for this purpose, and there were single-family residences under construction within less than a block of the subject tract at the time of the hearings below. The plaintiff acknowledges his intention to develop the area immediately south of the property in question with one-family homes. It is clearly apparent and virtually conceded by one of plaintiff's witnesses that the predominant characteristic of the neighborhood is its single-family residential development, and we regard the commercial area and 'town dump' on Cicero Avenue as too remote to affect the area in question. . . .

The same principles stated in the foregoing case, apply to the residential density in the case at bar. Here the subject property is in the middle of uniform and established low density (single-family) residential uses west of it and east, across Halsted Street. In addition the Rosewood Corporation, a land developer, has acquired the entire east frontage on Green Street between 91st and 92nd Street (the west half, across an alley, of the block in which the north portion of the subject property is located); and has already begun to develop its tract with single-family residences and townhouse duplex dwellings all within the R3 zoning in which the subject property is located. Permits have been obtained and excavations made for 2 or 3 of Rosewood's planned single-family residences. Plaintiff's proposed use would depreciate the Rosewood property because of the resistance of people to moving into more crowded neighborhoods. All of this shows not only the extensive development of low density housing around the subject property but shows further, the development of the R3 zoning in the same block as part of the subject property was continuing at an even less density of residential use than the maximum permitted by the R3 zoning. Consequently, all of the residential development in the area is settled and uniform of a density substantially less than that imposed upon the subject property under the R3 zoning. The conclusion is unavoidable that the uniform and settled residential uses surrounding the subject property lend no support to plaintiff's proposed use which would crowd twice as many families onto the subject property as the existing R3 zoning would allow. The existing R3 zoning is supported, not only by surrounding uniform and settled residential

density, but also by the current trend in residential development; and, therefore, the judgment of the trial court should be reversed.

Furthermore, the R3 zoning of the subject property is supported by the zoning and every existing use in the entire blocks in which it is located. In Ryan v. County of DuPage, 28 Ill.2d 196, 190 N.E.2d 737 (1963) and Bennett v. City of Chicago, 24 Ill.2d 270, 181 N.E.2d 96 (1962), the court, in sustaining low density single-family residential zoning against a proposed high density multiple-family use, stressed the compelling influence of the uses existing in the same block with the property for which a higher density of use was sought. In the Ryan case, the court said at page 197:

> On the facts, this case is strikingly similar to Bennett v. City of Chicago, 24 Ill.2d 270. There, as here, the area north of a heavy traffic street (Irving Park Road) was zoned and had been developed for residential purposes while on the south side of the street the development was commercial. It was held that the property was characterized by the residential zoning and development on the north side of the street rather than the commercial and high density development to the south. We are of the opinion that the plaintiff's property takes its residential character from the area to the west, north and east and that it is zoned in conformity with surrounding existing uses, a factor of paramount importance. . . . (Emphasis supplied.)

The foregoing principle applies to the case at bar. Here all existing uses in the blocks in which the subject property is located are of a low density residential use which meets the requirements of the R3 zoning. This even includes the improvements made by the plaintiff. To the west of the subject property the existing single-family uses are of lower density. To the east of the subject property on the east side of Halsted Street and on the streets east of Halsted Street, the most recent development has been the extension of single-family residences, all of a lower density of use than the maximum R3 density of the subject property.

Furthermore, plaintiff has not sustained any unusual hardship because of the R3 zoning of the subject property, as plaintiff has actually developed a substantial portion of the subject property under

the R3 zoning and mere loss of profit does not, of itself, justify nullification of the Zoning Ordinance. It is well settled that a zoning ordinance will not be voided solely because the property owner might suffer a loss of profit or other economic loss. Here, plaintiff's real estate expert testified that the subject property for the R3 zoned uses is valued at from $120 to $125 per front foot and for the proposed R4 density of residential use at $150 per front foot. Plaintiff bought the subject property with full knowledge of the R3 zoning and with the intention of improving the property in conformity with the R3 zoning. In fact, plaintiff actually designated zoning lots as required by the R3 zoning and actually erected buildings which satisfied the R3 density limitations. Plaintiff's effort to increase the density of use of the subject property came as an afterthought, after plaintiff had already committed itself to conform to the R3 density. Plaintiff's beneficiaries are experienced real estate developers. Joseph Pecora, the party in interest who testified, described himself as a real estate broker and builder.

In American National Bank & Trust Co. v. City of Chicago, 30 Ill.2d 251, 195 N.E.2d 627 (1964), the court in sustaining single-family zoning against a proposed higher density multiple-dwelling use, said at page 254:

> The beneficial owner, Valenti, is a building contractor and realtor of more than 20 years experience, who has built and sold many homes in this area. He purchased the four lots . . . with full knowledge of the single-family zoning classification. While a purchaser is not precluded from challenging a pre-existing zoning classification, his purchase in the face of the zoning restrictions, is a factor to be considered. (Vedovell v. City of Northlake, 22 Ill.2d 611.) As we have said where a purchase was made with full knowledge of the existing residential classification, '* * * (I)t is not unreasonable to suppose that the price paid was commensurate with that purpose. Under these circumstances, it can hardly be found that the ordinance has diminished the value of plaintiff's property or is confiscatory.' Elmhurst Nat. Bank v. City of Chicago, 22 Ill.2d 396, 402-403.

This principle applies likewise to the case at bar.

In Kioutas v. City of Chicago, 59 Ill. App.2d 441, 208 N.E.2d 587 (1965), this court further limited the contention that the property

will be more valuable if the zoning is changed to permit construction of more dwelling units thereon, saying at page 454:

> . . . That factor is to be considered in determining the validity of a zoning ordinance, but it is not of itself determinative particularly where the proposed use would depreciate the value of other property in the area.

This factor is present in the case at bar. Samuels testified, for defendant, that the rezoning of the subject property from R3 to R4, would make it more difficult for Rosewood Corporation, owner of property in the same block as the north portion of the subject property, to sell the homes which they planned to build under the R3 zoning, because of the resistance of people to moving into more crowded neighborhoods. Hence, plaintiff's proposed crowding of more residents into the same block would depreciate the Rosewood property by reducing its appeal and saleability.

Owners of single-family residences fronting on the east side of Green Street, in the same block as the subject property between 92nd and 93rd Streets, testified that the proposed use would depreciate their properties, by increasing the congestion of people, by creating parking problems and by crowding schools.

The City's planning expert McKinnon testified that from a planning point of view, the proposed R4 use would have a depreciatory effect on the surrounding neighborhood; that doubling the number of existing buildings would create a canyon effect with no architectural variation, with curtailed setbacks and side yards, restricting light and air. These are circumstances which in themselves have a deleterious effect on the neighborhood in general. He could not, however, reduce the depreciatory effect to money terms. The increase in density of use to R4 would produce an adverse effect on the single-family homes west of the subject property.

McNamara, the City's real estate expert, also lends strength to the proposition that the proposed use would depreciate the value

of surrounding property, when he testified, on cross-examination that the highest and best use of the subject property is the most capital that an owner can get from his property without a depreciating effect on surrounding property. The plain implication from this definition is that plaintiff's proposed higher density of use could not be attained without depreciating surrounding property. This corroborates the testimony and opinions of the home owners in the neighborhood of the subject property.

The evidence in this case further establishes that the subject property is suitable for the uses permitted under the R3 zoning and that there is an economic demand for housing which meets the R3 zoning at a reasonable return to plaintiff. Plaintiff's own testimony shows that the subject property is suitable for use with improvements which satisfy the R3 zoning regulations.. Joseph Pecaro, one of the beneficiaries, testified:

> Well, we started out renting at $99 for the one-bedroom apartments and $125 for the two-bedrooms and we only have eight one-bedroom, so they were renting terrifically, so we raised the rent to $114. That's where we are currently; $114 for one-bedroom and $125 for two-bedrooms.

At a later date Pecaro testified:

> I think last week we had 28 of the rented and we have 30 of them rented, there were two more moved in, and we have more additional applications which indicates a very good market, I think, because as I say these last two were just completed. In fact, we just put the sod in there. * * * There were four apartments in each building and there are 36 apartments altogether. * * * Each building has three two-bedroom apartments, which is four rooms each. * * * Then each building has a one-bedroom apartment, which is a three room apartment.

Thus, plaintiff's own testimony reveals that each of the R3 buildings already built on the subject property will yield a gross maximum income of $5,868.00. This is a substantial rate of return. Plaintiff has submitted no evidence that shows that such a return is so low as to constitute a hardship or that it is confiscatory in relation to the undisclosed amount of plaintiff's investment.

CHICAGO BAR ASSOCIATION

Finally, the owners of single-family residences and other low density residential developments who built or purchased their properties in reliance upon the existing R3 zoning have a right to rely upon the continuation of the R3 zoning of the subject property. Owners of low density single-family residences in the same block as the southern portion of the subject property, testified to their reliance upon the continued R3 zoning of the subject property. Rosewood Corporation, the owner of the remainder of the block in which the north parcel of the subject property is located, is planning a low density development of its half of the block within the R3 regulations and has relied upon the continuance of that zoning not only in its own half of the block but also in the subject property. Further, plaintiff's proposed crowding of more people on the subject property would reduce the desirability of the corporation's property and its saleability. Therefore, it would depreciate its value, because potential buyers resist moving into more crowded neighborhoods. Other resident home owners in the general neighborhood also testified that they relied upon the continuance of low density uses on the subject property. In Urann v. Village of Hinsdale, 30 Ill.2d 170, 195 N.E.2d 643 (1964), the court, in sustaining low density single-family residence zoning against a proposed higher density apartment use, said at pages 176-177:

> . . . Other persons living in the single-family residence district involved have a right to rely upon the precept that the classification will not be changed within the district unless the change is required for the public good, . . . and there is credible evidence here that the use of the plaintiffs' property for apartments will depreciate the value of nearby residences and create congestions the single-family residence classification was designed to prevent. . . .

The foregoing principle applies to the case at bar. Although R3 zoning permits low density multiple dwellings, plaintiff proposes to double the number of buildings and the consequent number of families to be crowded onto the subject property. It is this crowding which is repugnant to the reliance of other interested home owners upon the

R3 zoning of the subject property.

For the above reasons the judgment is reversed and cause remanded with directions to dismiss the complaint for want of equity.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS THE COMPLAINT FOR WANT OF EQUITY.

BRYANT, P.J., and BURKE, J., concur.

75 I.A.2-103

50951

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NATHANIEL WILLIAMS, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction after a bench trial for aggravated battery and attempted robbery, with sentence in the Illinois State Penitentiary for a period of five (5) to ten (10) years.

Vincent Galias testified that on August 14, 1964, he owned and operated a grocery store at 4100 West 47th Street; that on that date, he was cleaning his store when a man came over to him and said: "This is a hold-up" and that he put his hands up but the man proceeded to shoot him. Galias identified the defendant, Nathaniel Williams, as the man who shot him. Galias then testified that at the time he was shot, defendant was no more than four to five feet away from him. On cross-examination, Galias testified that he was 72 years old; that he identified defendant in Boys Court on October 20, 1964, as the boy who shot him; that he never told the police another boy had shot him; that he was sure that defendant was the perpetrator of the crime; and that his wife was present in the store at the time of the shooting.

Mrs. Magdalene Galias testified, through one Edward Guzan, an interpreter, who could translate Polish into English and English into Polish, that on August 14, 1964, at about 5:30 P.M. she was in her grocery store, located at 4100 West 47th Street, when defendant came in, bought some gum and ordered a Pepsi Cola; that he went to the window, looked out and asked her to open the pop; that he went over to her husband and said: "This is a hold-up"; that defendant shot her husband, ran outside and got into a car; and that she saw defendant get into a station wagon in which another boy was waiting. She

positively identified defendant as the man who held up and shot her husband. On cross-examination she testified that defendant did not have on eyeglasses and that her husband was approximately five feet away from where she was in the store when he was shot.

James Cusak, a police officer, testified that on August 14, 1964, he investigated an armed robbery at the Galias store, 4100 West 47th Street; that an unknown man gave him the license number of a car containing two men; that the police checked the license and found the automobile at 4300 on LaPorte Avenue; that after keeping the car under surveillance, they went to the home of Jeffrey Walker, placed him under arrest and received information that defendant had been with Walker that day; that as a result of his conversation with Walker, he processed defendant on a charge of robbery, attempted robbery and a shooting; that he took Walker and defendant Williams to the hospital, at which time, the victim Galias, who was still groggy, identified Walker; that he then took the two boys to the Galias store where Mrs. Galias viewed the two boys; that her answers to his questions were unresponsive; and that on October 20, 1964, in Boys Court, Mr. and Mrs. Galias identified defendant as the man who shot Mr. Galias.

On cross-examination, he testified that Mr. Galias first identified defendant on October 20th; that he had a conversation with Mr. Galias after he identified Walker and had him sign a complaint against defendant; and that no pictures of defendant or Walker were ever shown to Mr. and Mrs. Galias. The State then rested its case and the defense made a motion for directed finding. It was denied by the court.

The defense then called Mabel Williams, the mother of defendant. She testified that on August 14, 1964, she was home all day; that her son was home on this date and that he was seen by her about 6:10 P.M., when she left the house. On cross-examination she

testified that she did not hear the police ask defendant if he was with Walker between 4:00 and 6:00 P.M. The defense then rested.

On rebuttal, the State called Officer Cusak, who testified that he had a conversation with defendant on August 15, 1964, at which time his mother was present and that defendant stated at that time that he was with Walker until 6:00 P.M. On cross-examination he testified that Mrs. Williams did not tell him that her son was home between 7:00 A.M. and 6:00 P.M.

The court found defendant guilty as charged in the indictment. The defense made a motion for a new trial and a motion in arrest of judgment, which were both denied. The court, thereupon, sentenced defendant.

Defendant's theory of the case is

(1) that the trial court erred in

(a) finding defendant guilty without a positive identification of the accused,

(b) letting in evidence that was admittedly encouraged by a Police Officer,

(c) permitting an interpreter to be used by the State without a showing of inability of the witness to understand and speak English,

(d) accepting the interpreter's narration of the witnesses'answer,

(e) letting the interpreter carry on a conversation with the witness when no questions were pending,

(f) allowing evidence of a conversation between the defendant and a co-defendant implicating defendant,

(2) that the State failed to prove its case beyond a reasonable doubt.

In support of his contention that there was no positive identification, defendant points out that the identification by the victim, on the day after the occurrence of the crime, was changed after a Police Officer notified the victim that he had identified the co-defendant. The Supreme Court of the State of Illinois said at page 286 in People v. Donald, 29 Ill.2d 283, 194 N.E.2d 227 (1963):

> . . . In weighing evidence of identification, the attendant circumstances, along with the probability or improbability of an adequate opportunity for a definite identification, must be considered. (People v. Gold, 361 Ill. 23; People v. Peck, 358 Ill. 642.) However, the positive identification by one witness who had ample opportunity for observation may be sufficient to support a conviction even though such testimony is contradicted by the accused. . . .

In the case at bar, Galias, the victim, positively identified defendant as the man who shot him. At the trial he got off the witness stand and pointed out defendant, saying he was sure that this was the man who shot him. The record shows that Mr. Galias tended to ramble while testifying and on cross-examination got somewhat excited, however, at all times he was positive in his identification of defendant. His wife, Mrs. Galias, although excitable, also positively identified defendant as the man who shot her husband. She testified that defendant purchased a soft drink from her, went over to her husband, told him it was a hold-up and then shot him. Thus, two witnesses, who had ample opportunity to observe defendant, positively and unequivocally identified him.

The law is well settled that the testimony of one credible witness alone, if positive, is sufficient to convict even though the testimony is contradicted by the accused. People v. Miller, 30 Ill.2d 110, 195 N.E.2d 694 (1964); People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963). In the present case, not only one but two witnesses identified defendant and no reason exists for this court to find that their identification was improbable, incredible or unreliable.

Defendant next points out that the identification was not voluntary in that it was encouraged by a Police Officer. An examination of the record shows that this contention is without merit.

We also find that defendant's contentions that an interpreter should not have been allowed, that the court should not have accepted the interpreter's narration of the witnesses' answer and that the court

erred in allowing the interpreter to carry on a conversation with the witness when no questions were pending, are all without merit. In the interest of justice and for the orderly conduct of a trial, the trial judge, in his discretion, may allow an interpreter to be used. People v. Murphy, 21 Ill.2d 149, 171 N.E.2d 618 (1961). It is obvious that defendant was not prejudiced by the use of the interpreter.

Defendant next contends that the court erred in admitting testimony by a Police Officer of a conversation by a co-defendant implicating defendant in a crime after defendant denied it. We disagree with defendant. At the outset it must be made clear that the statement in which the co-defendant stated that defendant had stated that he wanted to get out of town because he had shot a policeman, was not introduced as evidence against defendant. The court at the time the statement came up, specifically stated, that it was not going to be used as evidence against defendant, but rather to show the reasons for the police officers' conduct. Later, after both sides had rested, the court reiterated that the statement was not being used as evidence against defendant.

Furthermore, in response to the various allegations of error by defendant, in a case where a jury is waived and the trial court sits as the finder of fact, as in the case at bar, a reviewing court will consider that the trial judge only considered competent evidence. People v. French, 33 Ill.2d 146, 210 N.E.2d 540 (1965). Clearly that is what occurred in the case at bar and no reason exists for the court to reverse the action of the trial judge.

Finally, defendant contends that he was not proven guilty beyond a reasonable doubt. The case at bar depends on the weight and credibility of the testimony given by the witnesses. The courts have said repeatedly that in a bench trial of a criminal case the trial court's judgment, based upon the credibility of the witnesses,

will not be disturbed unless it is based on clearly unsatisfactory and improbable evidence. This rule was stated in People v. Hawkins, 54 Ill. App.2d 212, 203 N.E.2d 761 (1964), where the court said at page 217:

> . . . A reviewing court will not substitute its opinion as to credibility of the evidence unless the proof is so unsatisfactory as to justify a reasonable doubt of guilt, . . .

The trial court in the case at bar determined the credibility of each of the witnesses and based on this determination found the defendant guilty. There is absolutely nothing on the face of the record that requires this court to hold that the testimony of the victim was inconsistent beyond belief and contrary to human experience and, therefore, requires this court to reverse the finding by the trial court.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

Filed 9-17-66

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No. 66-30

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1966

Abstract

PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. MOSE HARDY, Appellant.	)	Appeal from the Tenth Judicial Circuit of Illinois, Peoria County.

CORYN, P. J.

Upon trial by jury in the Circuit Court of Peoria County, the defendant, Mose Hardy, was found guilty of burglary. The post-trial motions filed by defendant were denied, and after a hearing on mitigation and aggravation, the trial court sentenced the defendant to not less than five nor more than seven years in the Illinois State Penitentiary. From this judgment the defendant appeals here, raising two issues; that is, (1) that the charge of burglary was not proved beyond a reasonable doubt, and (2) that the trial court erred in admitting into evidence, without proper proof of ownership or possession in defendant, certain burglary tools.

Appellate Court Rule 6 (ch. 110, § 201.6, Ill. Rev. Stat.) and Supreme Court Rule 38 (ch. 110, § 101.38, Ill. Rev. Stat.) require that a party prosecuting an appeal furnish an abstract of record, which

Filed 9-17-66

FTA 2-109

abstract shall present clearly and concisely in narrative form the substance of the record necessary for a full understanding of the issues being raised on appeal. Upon motion and good cause shown, after filing the record on appeal, the Appellate Court may dispense with the furnishing of an abstract or with the abstracting of certain matters in the record even though they are to be considered on appeal. We are critical of the defendant for failing to file an abstract of record herein. Of the various remedies available to us to cure this neglect, we have elected, on this occasion, to review the entire record on appeal, and to decide this cause on its merits.

All of the evidence in this case was presented by the prosecution. A fair summary of this evidence indicates that American Legion Post 1151, located at 419 North Fisher Street in Peoria, operated a bar and restaurant in the basement of its hall. Eugene Anderson, a bartender there for eleven years, testified that on October 23, 1964, at 1:00 a. m., he stopped serving drinks and closed the bar for the night. Anderson examined the premises to make sure that no persons remained inside, then checked the windows and locked the doors and went home. Later in the evening he returned to the Legion Hall at the request of Post Adjutant Randolph Williams, where he observed that an outside window had been removed, and an inside door leading to the basement bar had been jimmied open.

Williams stated that he was notified by the Peoria Police of the burglary, and asked to come to the Legion Hall. Upon arriving, he observed that the window had been torn out and the inside door broken open. He testified that the defendant was not a member or employee of Post 1151, and that defendant had no authority to enter the Legion building.

At 3:20 a. m. several Peoria policemen, upon request over the

Filed 9-17-66

FIFTH 2-109

police radio, proceeded to American Legion Post 1151. They observed that an outside window had been removed and that an inside door leading to the basement had been jimmied open. Two of the policemen went to the basement bar room, where they found the defendant lying on a ledge behind a stove. Under the defendant's hands, wrapped in a shirt, were a hammer, screw driver, and brake tool. Officer Thompson marked these items with his initials, and then they were transported with the defendant to the Peoria police station. Neither the cash register or the liquor supply appeared to have been tampered. The defendant did not appear to be intoxicated.

It is the province of the jury to weigh the evidence and determine the facts, and a court of review will not reverse a judgment of conviction on the ground of insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify our entertaining a reasonable doubt. We are satisfied that the evidence herein is sufficient to sustain the conviction of the defendant for burglary. See People v. Pulaski, 15 Ill. 2d 291.

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The principle argument of the defendant is that the shirt, hammer, screw driver, and brake tool should not have been admitted to evidence as People's Exhibit 5 through 8, as these articles were "unconnected with the appellant," and because "non-ownership" of these articles in persons other than defendant was not established by the State. The rule is that where there is no evidence connecting the accused with the crime charged, that burglary tools found at the scene of the crime, are not admissible evidence, but that where there is an abundance of closely connected circumstances tending to show possession of burglary tools in the defendant at the time of the commission of the crime such exhibits are admissible.

Filed 9-17-66

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People v. Panczko, 381 Ill. 625; People v. Fitzpatrick, 359 Ill. 363; People v. Stanton, 16 Ill. 2d 459. The record here clearly discloses that the American Legion Building had been broken into, and that the defendant was found by the police inside this building with the disputed exhibits in his hands. Under these circumstances, People's Exhibits 5 through 8 were properly admitted.

Accordingly, the judgment of conviction is affirmed.

Affirmed.

Alloy, J. and Stouder, J. concur.

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3 I.A.2 109

No. 66-12

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EARL GAITHER, Administrator of the Estate of Joyce M. Gaither, Deceased, and EARL GAITHER, Plaintiffs-Appellants, -vs- ROBERT STEVENSON, Defendant-Appellee.	)	Appeal from the Circuit Court of Shelby County. Honorable Daniel L. Dailey, Presiding Judge.

George J. Moran, J.

This is an appeal from a judgment striking certain portions of the plaintiffs' amended complaint, denying their request to amend further, and granting a summary judgment for the defendant Stevenson.

This action was brought by the administrator of the estate of Joyce Gaither, deceased, under the wrongful death act and by her father under the family expense act, against both Marla James and Robert Stevenson. Counts I and II of the amended complaint alleged that the plaintiff's intestate was a guest in an automobile driven by Marla James and that, as a direct and proximate result of specified wilful and wanton acts and omissions of the driver, she received injuries which resulted in her death. Counts III and IV alleged that Robert Stevenson was the owner of the automobile; that Marla James took it from where it was parked near his premises; that he was guilty of wilful and wanton misconduct in one or more of the following ways:

> A. Wilfully and wantonly permitted said vehicle to stand on a public highway near his home without locking the ignition contrary to Section 189, Chapter 95-1/2, 1963, Illinois Revised Statutes.
>
> B. That he wilfully and wantonly, expressly or impliedly gave said Marla James permission to drive said motor vehicle when he knew or in the exercise of due care should have known that the mechanical condition of such car was such that it would be dangerous to the occupant thereof to drive the same.

C. Wilfully and wantonly left said car parked near his house when he knew or in the exercise of due care should have known that said Marla James would take said car and drive the same and when he knew or in the exercise of due care should have known that the car was in such a mechanical condition that it was dangerous to drive the same in such mechanical condition.

D. Wilfully and wantonly failed and omitted to take affirmative mechanical measures to physically make it impossible to drive said car after he knew or in the exercise of due care should have known that the car was in such mechanical condition that it was dangerous to be driven to the occupants thereof and that said Marla James would take and drive said car.

E. Wilfully and wantonly allowed said car to stand on or near his premises without rear brakes when he knew or in the exercise of due care should have known that said car was dangerous to the occupants thereof, if driven and that said Marla James would take and drive said car.

F. Wilfully and wantonly allowed said car to remain on or near his premises with a defective gear mechanism which he knew or in the exercise of due care should have known would be dangerous to the occupants thereof, if driven, and that said Marla James would take and drive said car.

G. Wilfully and wantonly failed and omitted to have the brakes and the gear mechanism on the car repaired after he knew or in the exercise of due care should have known that said car was dangerous to the occupants thereof if driven and that Marla James would take said car and drive the same in its defective condition.

H. Wilfully and wantonly failed and omitted to have the brakes on said car in good working order and failed to have the brakes on said car adjusted so as to operate as equally as practical on opposite sides of the vehicle, contrary to Section 211, (4)-B-5 of Chapter 95-1/2, 1963, Illinois Revised Statutes, when he knew or in the exercise of due care should have known that Marla James would take and drive said car to the danger or hazard of the occupants thereof.

and that his wilful and wanton acts or omissions resulted directly and proximately in the injuries sustained by the deceased.

The defendant Stevenson moved to strike subparagraphs B through H because they constituted conclusions of the pleader without factual allegations and because they did not constitute a cause of action. He moved that other related and dependent parts of Counts III and IV be stricken for the same reasons, and moved for summary judgment on the remaining part, Subparagraph A,

attaching two affidavits to the effect that the automobile was parked at all times in his driveway. Finally, he urged that the court deny any motion for leave to amend further since the amended complaint suffered from substantially the same defects and objectionable qualities as the original complaint. The court granted the motions and entered judgment in bar of action against the plaintiffs.

In McDavid v. Fiscar, 342 Ill App 673, at 683, the court stated that, under the Civil Practice Act, "pleadings shall be liberally construed with a view of doing substantial justice between the parties. It is a rule of pleading long established that the pleader is not required to set out his evidence. (People v. Colegrove, 354 Ill. 164.)" Since sufficient facts were stated by the pleadings to inform the opposite parties concerning the nature of the cause of action alleged, the lower court erred in striking the aforementioned portions of the amended complaint.

Since the allegations in the complaint must be taken as true, it sufficiently appears that Robert Stevenson knew or should have known that his automobile was in such mechanical condition that it was dangerous to be driven and that he impliedly or expressly gave permission to Marla James to drive his automobile. If the plaintiffs succeed in proving these allegations, they will be entitled to recover. This was the holding in Dyreson v. Sharp, 333 Ill App 198, where the court stated at 205-06 that:

> It will be observed in the complaint in this case that the third and fourth counts charge the defendant with wilful and wanton misconduct, as having knowledge of the defective condition of his automobile, and in loaning the same to Mayhard Hughes for the purpose of taking the plaintiff riding. ...Certainly, if the plaintiff can prove that the defendant knew that the steering gear of his automobile was in such defective condition that it would lock, and the driver of the same would be unable to control it on a public highway, that this would be a reckless disregard of the rights of other people either riding in the car, or other people on the road, and he would be guilty of willful and wanton misconduct in so allowing the car to be driven upon the highway in such condition.
>
> It is our conclusion that the complaint in this case stated a good cause of action against the defendant, and the court erred in sustaining the motion to dismiss the same, and entering judgment in favor of the defendant.

The plaintiffs argue that the trial court abused its discretion and was summary and arbitrary in refusing the plaintiffs the right to amend further. Considering that the complaint did allege a cause of action and that the case must be reversed and remanded, the plaintiffs should be allowed to amend their complaint further if they so desire. Dyreson v. Sharp, supra.

The plaintiffs also argue that the court erred in granting the summary judgment as to Subparagraph A, the only part of the pleadings remaining after the motion to strike was granted, because the affidavits submitted were insufficient to support the motion. Subparagraph A alleged that Robert Stevenson wilfully and wantonly permitted his automobile to stand on a public highway near his home without locking the ignition, contrary to an Illinois statute. Both affidavits state that, until Marla James and her friends left the Stevenson residence, the "automobile owned by him was parked on the driveway located on his private premises." The plaintiffs filed no counter-affidavits and, thus, they have admitted the facts disclosed in the affidavits. St. Louis Fire and Marine Ins. Co. v. Garnier, 24 Ill App 2d 408. Since there was no issue of fact presented concerning the presence of the automobile on the defendant's driveway by anything other than the unverified pleadings, the trial court properly granted the summary judgment as to Subparagraph A. Winger v. Richards-Wilcox Mfg. Co., 33 Ill App 2d 115.

For the foregoing reasons the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion.

Reversed in part, affirmed in part,
and remanded for further proceedings.

CONCUR:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

PUBLISH ABSTRACT ONLY.

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50199

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MAURICE BLEWETT (Impleaded), Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was indicted with Raymond and Earl Soldat under two indictments for robbery. Raymond Soldat pleaded guilty. Defendant and Earl Soldat were tried before a jury which resulted in a mistrial as to defendant. He was thereafter tried and found guilty by a jury and was sentenced to 15 to 30 years in the penitentiary on each charge. He appeals.

On the evening of January 13, 1963, Milko Gracan and Urna Jovancevic were tending bar at Gracan's tavern in Chicago. Shortly after 8:00 P.M. three men entered the tavern and announced a holdup. All three men had their faces partly covered by their coat lapels. One of them went behind the bar where Mrs. Jovancevic was washing glasses and pushed a gun into her ribs. Mrs. Jovancevic testified she pushed the man, thereby revealing his face, and identified him as the defendant. The men proceeded to rob Gracan and Mrs. Jovancevic. Shortly thereafter two musicians, the Pesakovic brothers, entered the tavern, and all four persons were taken to the basement. Mrs. Jovancevic testified she again saw the face of the defendant on the way to the basement. Defendant and the Soldat brothers were arrested in an automobile about one-half mile from the tavern some six hours after the incident. A gun was recovered from Raymond Soldat which was identified at trial by Mrs. Jovancevic as the gun used by defendant in the robbery.

At a police line-up the following day, defendant and the Soldat brothers were identified as the robbers. Neither Gracan nor the Pesakovic brothers were able to identify defendant. Before he was identified by Mrs. Jovancevic at the line-up, defendant was told

to put on a brown jacket which was allegedly worn by one of the robbers.

Defendant advances four grounds for reversal, that the identification of him was insufficient to establish his guilt beyond a reasonable doubt, that the State attempted to prove him guilty by means of guilt by association, that the imposition upon him to wear the jacket at the line-up rendered the identification by Mrs. Jovancevic a nullity, and that the gun found on Raymond Soldat was inadmissible as evidence against defendant and further was insufficiently identified by Mrs. Jovancevic.

It is well settled that a positive identification by one witness is sufficient to sustain a conviction. People v. McCall, 29 Ill.2d 292. A review of the record clearly shows defendant to have been positively identified as one of the robbers by Mrs. Jovancevic. Mrs. Jovancevic had ample opportunity to observe defendant during the course of the robbery. She observed defendant's face as he stood next to her behind the bar and again as the victims were being taken to the basement. She positively identified defendant on the following day at the police line-up, and her identification of him at the trial was equally positive.

Defendant maintains that Mrs. Jovancevic's testimony at the second trial conflicted with that given by her at the first trial, destroying her credibility as a witness. She testified at the second trial that all three men had their mouths covered with their coat lapels, which was also testified to by Gracan. Her testimony at the first trial was that defendant did not have his hand in front of his face; it does not appear any mention was made of defendant's coat lapel being held in front of his mouth. This is a question of semantics and was a matter for the jury. Furthermore, that part of the testimony given at the first trial which was entered into evidence at the second trial for impeachment purposes is incomplete; it is impossible

CHICAGO BAR ASSOCIATION

to determine the extent of the quetioning on this matter. Defendant also points to the fact that Mrs. Jovancevic testified at the second trial that she shoved defendant, thereby revealing his face, whereas no mention was made of this during her testimony at the first trial. However, the record in no way indicates Mrs. Jovancevic was questioned as to this matter or otherwise given an opportunity to furnish all details of the incident at the first trial; there was no impeachment by omission of facts. Larrance v. People, 222 Ill. 155,160.

On cross-examination of Milko Gracan, the defense established that the witness, at the first trial, identified the Soldat brothers as two of the robbers, after which the State brought out that the witness saw defendant in the courtroom during the first trial. Defendant's claim that this was an attempt on the part of the State to establish defendant's guilt by association is unfounded since the defense brought the matter out in the first instance. People v. Gray, 57 Ill. App.2d 221. Furthermore, no prejudice to defendant resulted from this testimony in view of the other evidence in the record and the fact that the witness expressly testified that he could not identify defendant as one of the robbers.

Defendant next contends the imposition upon him at the line-up to wear the jacket allegedly worn by one of the hold-up men without having connected defendant with the jacket rendered Mrs. Jovancevic's identification a nullity. Mrs. Jovancevic, however, testified that the jacket played no part in her identification. She expressly testified on cross-examination that she identified defendant "with the face, not with the jacket."

Defendant finally maintains that the gun recovered from Raymond Soldat was inadmissible against him at the trial and that it was not properly identified by Mrs. Jovancevic. A weapon recovered from one of two defendants which was used in the commission of a crime may be used as evidence against either of them in a prosecution for that crime.

People v. Jones, 29 Ill.2d 306; People v. Pittman, 28 Ill.2d 100. The question of whether Mrs. Jovancevic properly identified the gun does not bear on the admissibility of the gun as evidence, but relates to the question of the weight to be given by the jury to her testimony. Mrs. Jovancevic was exposed to the gun for a great length of time; she stated she was certain the gun entered into evidence was the one pushed into her ribs by defendant; and three witnesses testified that at least one gun was used during the robbery. Whether the gun was sufficiently identified was a question for the jury.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50377

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SAMUEL CAIN, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was tried at a bench trial under a two count indictment for attempted rape and taking indecent liberties with a child. He was found guilty on both counts and was sentenced to 10 to 14 years in the penitentiary on the attempted rape charge and 10 to 16 years on the indecent liberties charge, the sentences to run concurrently. He appeals.

On February 29, 1964, Mrs. Charlie Mae Brown was living in an apartment in Chicago with her three children, Lambert, age 16, Dennis, age 10, and Olivia, age 4. About 1:00 A.M. on that date Mrs. Brown left the apartment in the company of a girlfriend, leaving the three children alone. Upon her return about 4:00 A.M. she noticed defendant's automobile parked in front of the apartment. Defendant was her ex-boyfriend and Mrs. Brown did not wish to see him at that time and again left. Upon her return at 8:00 A.M., Mrs. Brown found blood stains on Olivia's clothing and bed. The police were called who took Olivia to the Jackson Park Hospital. The child was examined and it was determined that she had sustained a small tear in the posterior fourscette of the vagina.

Lambert Brown testified that about 3:00 A.M. on the morning in question he was awakened by his sister's crying and got up to investigate. He heard noise in his sister's bedroom and saw defendant standing in the bedroom doorway. Lambert testified that defendant looked dazed, his clothes were disarranged and his trousers were open. Defendant was asked what was wrong with Olivia but he refused to answer. Lambert entered the bedroom and found Olivia lying

face down on the bed in a pool of blood. Lambert testified that his sister was bleeding profusely from her private parts, that he took her to the bathroom where he washed her off, and that he then placed his sister in bed with Dennis. Defendant left the apartment, and Lambert locked the door and waited for his mother to return home. He later left the apartment for his morning paper route and did not return until approximately 8:30 or 9:00 A.M.. Lambert stated that he did not call the police or an ambulance because defendant seemed intoxicated and Lambert was afraid of what defendant might do to him; he further stated that he did not tell anyone of the incident because he knew of no one to tell.

Dennis Brown testified that approximately 3:00 A.M. on the morning in question he was awakened and saw defendant standing in his bedroom doorway. Defendant asked Dennis to keep $20 for him so that defendant would not spend the money, after which Dennis fell asleep. He was later awakened when Lambert put Olivia in bed with him. At defendant's request Dennis returned the $20 to defendant and defendant left the apartment. Lambert left a short while later for his morning paper route.

Chicago Police Officer Robert Casey arrested defendant on March 2nd, at which time defendant told him he had been to the Brown apartment on the night of the incident to get some clothing, but that no one answered the doorbell and he did not enter the apartment. The officer further testified defendant told him his automobile developed a flat tire while parked in front of the apartment and that he sat in the automobile for a while.

Defendant testified in his own behalf and stated he had been visiting and drinking with friends on the evening of February 28th in Dixmoor, Illinois, and that he left shortly after 11:00 P.M. and proceeded to the Brown apartment to give Mrs. Brown some money. No one answered the doorbell so defendant went back to his automobile

which failed to start because of motor trouble. He testified he then took a taxi cab to 39th Street and Cottage Grove Avenue to locate someone to help him repair his automobile and remained on 39th Street until 7:00 A.M. on February 29th. Defendant denied having been in the Brown apartment on the night in question, and further denied having in any way touched or attempted to molest Olivia Brown.

Two other witnesses testified for defendant and corroborated his testimony to the extent that he had been in Dixmoor during the evening of February 28th and on 39th Street during the morning of February 29th. The testimony of the two witnesses, however, conflicted with defendant's testimony concerning such matters as whether any alcohol was consumed in Dixmoor, whether defendant slept while in the area of 39th Street, and the like.

Defendant first maintains that he was not proven guilty beyond a reasonable doubt because of "the highly questionable testimony" of Lambert and Dennis Brown. He alleges that the two boys had a grudge against him and were therefore biased in their testimony. He further contends that a reasonable inference exists that Lambert Brown injured his little sister, due to Lambert's "suspicious actions" after he found his sister had been injured.

Defendant denied having been in the Brown apartment on the night in question, squarely contradicting the testimony of Lambert and Dennis Brown. It is well settled that the credibility of witnesses is for the trier of fact and that a reviewing court will not substitute its judgment for that of the trier of fact unless the evidence is manifestly unbelievable. People v. Boney, 28 Ill.2d 505, 510. The trial judge commented that he felt Lambert and Dennis were intelligent and were telling the truth, that the testimony of neither boy was shaken on cross-examination, and that their testimony was clear, unemotional and objective. He further found that defendant's evidence was replete with inconsistencies. We have searched the record and find defendant's first contention to be groundless.

The evidence, together with all reasonable inferences therefrom, clearly shows defendant to be guilty of taking indecent liberties with Olivia Brown. The testimony of Lambert and Dennis Brown placed defendant in the apartment on the night in question, which corroborated by Mrs. Brown's testimony that she saw defendant's automobile parked in front of the apartment about 4:00 A.M.. Defendant admitted being in the vicinity of the apartment that night. At approximately 3:00 A.M. Lambert heard his sister crying, went to her bedroom and saw defendant standing in her bedroom doorway. When asked what was wrong, defendant refused to speak. Lambert entered his sister's room and found her on the bed, lying in a pool of blood and bleeding profusely from her private parts. The hospital report showed there was dried blood on both of the child's thighs, blood on her underclothing and a tear in her vagina. Under the evidence it is clear that defendant had engaged in some form of indecent liberties with Olivia Brown.

The contention made by defendant, that Lambert's "suspicious actions" after he found his sister was injured raises an inference that he perpetrated the act complained of, is mere conjecture. Lambert's actions after the incident were no more than those which a boy his age would perform under similar circumstances. Furthermore, defendant points to nothing of a substantial nature which would sustain his claim that Lambert was in any way connected with the incident. Defendant cannot raise a reasonable doubt of his guilt by an unsupported allegation that Lambert may have committed the crime.

The cases cited by defendant to support his claim that the testimony of the two boys is unbelievable and unconvincing are distinguishable on their facts. People v. Nunes, 30 Ill.2d 143, involves testimony of the alleged victim of indecent acts which is clearly unconvincing and inconsistent with other evidence in the case,

and acts of the alleged victim after the incident complained of which renders the occurrence of the incident highly questionable. People v. Ricili, 400 Ill. 309, involves the question of identification of the assailant and not the issue of unbelievable testimony which is raised by defendant herein.

While the evidence shows defendant to be guilty of taking indecent liberties with Olivia Brown, we do not feel that it proves him guilty of attempted rape. One of the elements of attempted rape is the intent to commit the crime itself. People v. Richardson, 18 Ill.2d 329, 333. The crime of attempt is defined as:

> "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." Ill. Rev. Stat. 1965, Ch. 38, Par. 8-4(a).

The crime of rape is defined as:

> "(a) A male person of the age of 14 and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape....
>
> "(b) Sexual intercourse occurs when there is any penetration of the female sex organ by the male sex organ." Ill. Rev. Stat. 1965, Ch. 38, Par. 11-1.

Lambert Brown, the sole witness who saw defendant near Olivia Brown, testified that he did not see defendant touch her or in bed with her. Consequently, it is only conjecture as to how defendant caused the tear in Olivia Brown's vagina. The fact that defendant's trousers were open does not raise the inference that he attempted or intended to rape Olivia. Furthermore, aggravated assault will not warrant an inference that there was an attempted rape without proof of intent to commit rape. People v. Stagg, 29 Ill.2d 415. We are of the opinion that the State's evidence lacks any proof of intent to commit rape and consequently fails to prove defendant guilty of attempted rape.

Defendant's final contention is that he was denied a fair

hearing in aggravation and mitigation, resulting in an unduly harsh sentence. We feel that the 10 to 16 years' sentence which was imposed was not unduly harsh in the light of the act perpetrated by defendant upon a four year old child.

The judgment is reversed on the charge in count two (attempt to commit the offense of rape) and affirmed on the charge in count one (committed the offense of indecent liberties with a child).

JUDGMENT REVERSED AS TO COUNT TWO AND AFFIRMED AS TO COUNT ONE.

BRYANT, P.J., and LYONS, J., concur.

50411

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM A. THOMPSON, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of theft from the person and was sentenced to one to five years in the penitentiary. He appeals.

Shortly after 4:00 A.M. on July 12, 1964, John Wells, the complaining witness, entered a subway station at Clark and Division Streets in Chicago. Wells had been drinking and, while waiting for the train, he fell asleep, slumped over a bench. Chicago Transit Authority Police Officers Gregory Zito and Gary Hill were in the station at the time; Officer Zito some 25 feet from Wells and Officer Hill some 12 feet. The station platform area where Wells was asleep was well-lighted. Both officers testified at trial that defendant alighted from a northbound train and approached Wells who was still asleep. Defendant circled Wells a number of times, then proceeded to remove a folder from Wells' pocket, remove currency from the folder, place the folder back into Wells' pocket, and put the money into his own pocket. Defendant then reached into another of Wells' pockets and removed a stick of gum. While attempting to pull a phonograph record from under Wells' arm, the defendant was arrested by the officers. Defendant was searched and $19 in currency and 75 cents in change was recovered. Wells was awakened by the officers and asked if he was missing any money. Wells checked his folder and stated that $18 or $19 was missing. Wells testified that he knew nothing of the incident until he was awakened by the officers and asked to inspect his wallet.

Defendant testified in his own behalf and stated that when he came to the subway station he noticed Wells asleep on the bench. He stated that he sat down next to Wells and when a train approached he shook Wells in an attempt to awaken him so that Wells would not miss the train. At this point the officers approached defendant and took him to a washroom where he gave the officers the $19.75 in his possession. He further testified that Wells stated to the officers upon their return to the station platform that he, Wells, did not have any money with him and that the person with whom he had been drinking that night put him on a train for home.

Defendant assigns two grounds for reversal on this appeal, that he was not proved guilty beyond a reasonable doubt and that he was convicted and sentenced for an act not made a crime by the Criminal Code. A third point was raised in defendant's brief, that the indictment was defective, but this point was waived in oral argument by reason of recent Supreme Court and Appellate Court decisions on the matter.

A review of the record clearly shows defendant to have been found guilty beyond a reasonable doubt. The two police officers witnessed the entire incident in a well-lighted area, one of the officers from a distance of 12 feet and the other from a distance of 25 feet. Wells told the officers that some $18 or $19 was missing from his wallet and $19.75 was found on defendant when he was searched. The inconsistencies alluded to by defendant in the testimony of the officers, relating to when and where the search of defendant took place, are nothing more than trifles when considered in the light of the total testimony of each officer. They in no way weaken or discredit the witnesses as to create a reasonable doubt of guilt. The fact that some four or five people were present on the station platform at the time of the incident, in addition to the officers, Wells and defendant, does not render it improbable that defendant would attempt to commit a crime as

he maintains. Finally, although the defendant told a completely different story than that told by the officers, it is well settled that the credibility of witnesses is for the trier of fact and that the determination by the trier of fact will not be disturbed on appeal unless the testimony is so improbable or untrustworthy as to justify a reasonable doubt of guilt. People v. Boney, 28 Ill.2d 505.

Defendant also contends that Section 16-1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1961, Chap. 38, Par. 16-1) does not create the crime of theft from the person. Contrary to defendant's claim, the legislature did not attempt to create the crime by way of the penalty portion of that Section. The Court in People v. Jackson, 66 Ill. App.2d 276, has recently considered a contention identical to that made here by defendant and found it to be without merit.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50415

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

HERBERT L. WRIGHT and IRENE L. WRIGHT,

Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendants were charged with disorderly conduct in violation of Section 193-1 of the Municipal Code of Chicago. They were also charged with resisting a peace officer and battery under the statutes relating thereto. The cases were heard together and it appears that the Assistant State's Attorney presented the case for the city in the prosecution of the disorderly conduct violation, as well as acting on behalf of the State with respect to the other charges. A jury trial having been waived, the court entered judgments against the defendants on all the charges and imposed fines of $25 for each offense. The court then waived the costs and suspended the fines. Defendants appeal from the judgments, claiming that the evidence as to each of them is insufficient to warrant any of the convictions.

It appears that at approximately 12:30 a.m. on the morning of October 25, 1964, defendants received a telephone call at their home in Maywood, Illinois, from their daughter Beverly Komons, who lived at 7040 Cornell Avenue, Chicago. The daughter, a registered nurse, had been attending a party when she became involved in an altercation with her brother during which he slapped her. The girl was upset and "close

to being hysterical," and in response to her call, the defendants drove to the girl's apartment arriving a little after 1:00 a.m.

Police Officers Ronald Stulgaitis and Frederick Scott testified that they received a call on the radio of their patrol car, reporting a disturbance at 7040 South Cornell Avenue and that they arrived at that address at approximately 1:20 a.m. They testified further that they heard loud shouting and yelling as they walked through the courtyard of the apartment building, that they rang the bell and were admitted to a hallway leading up to the apartment, and that as they climbed the stairs, they again heard "loud yelling and shouting." On cross-examination, Officer Stulgaitis said he did not know the identity of the complainant, and that he did not make an investigation of the other apartments in the building, but that "there were no other parties or noise around the building at that time." He further testified that when he entered the apartment, he saw a young woman sitting on a chair. She looked as if she had been beaten and he asked her if the defendants were responsible, to which she shook her head in the negative. Defendant Herbert Wright asked why he and the other officer were there and he replied that there had been a report of loud noise coming from the apartment. He further testified that Herbert Wright said it was his apartment and that he could yell as much as he wanted, and that Wright then began to shove him out of the door. Continuing, the officer said:

> "At this time I started placing him into custody. As I started...the wife,Irene, started hitting me, and started kicking....
>
> "I effected the arrest of Herbert Wright, he was backing away at this time, and I turned him over to my partner who was in the back....

> "At this time I effected the custody, also, of Irene Wright.... They had to be forced out of the premises out to the squad car.... Herbert Wright, after his arrest was effected, he calmed down. I placed handcuffs on him.
>
> "Irene, she kept screaming. I had to hold her in front of me to avoid her feet and hands clawing at me....
>
> "She kept kicking and screaming all the way down. She laid down on the grass, she had to be picked up."

The second witness presented by the State, Officer Scott, said that his testimony would be the same as that of Officer Stulgaitis. On cross-examination Scott testified that at no time did he or Stulgaitis pull out a weapon.

The defendants testified that one policeman entered the apartment with his gun drawn, the other with a club in his hand, that defendant Herbert Wright asked what was wrong, and that Officer Stulgaitis did not answer, but immediately put defendant Herbert Wright under arrest, handcuffed him, and when defendant Irene Wright asked if she might get her husband's coat and hat, she was also placed under arrest; that Stulgaitis grabbed his wife, shoved her out of the door, pushed her down the stairs and out across the lawn, and "knocked her down, kicked her in the shins and booted her several times," that when he attempted to go to her assistance, Officer Scott drew his pistol and warned him not to move.

Irene Wright said she was pushed down the stairs and thrown down on the lawn, that the policeman turned over her purse emptying its contents onto the lawn, that some money contained in it was never recovered, that each time she reached for something, the officer would step on her hands, that he said, "I ought to bash your head in," and that he continued

to pummel her as she lay on the grass. She also testified on cross-examination that she sprained her ankle when she was pushed down the stairs and that she saw a doctor a day later who advised her to stay off the ankle and to wear a rubber stocking.

Both defendants testified that they were never allowed to explain their presence in their daughter's apartment and that neither of them shoved, struck or kicked the officers at any time. They also alleged that they were mistreated at the police station, in that they were made to stand for over an hour in the back of the station. They admitted, however, that no complaint about this treatment of alleged police brutality was made during the time they were in custody.

Defendants' daughter Beverly Komons testified that she called her parents seeking their help, that she was close to hysteria at the time and that upon their arrival, she attempted to tell them what had happened. When asked if there were any loud noises or shouting emanating from her apartment, she said, "The only thing if there was, if I was hysterical, I might have been shouting a little bit." As to the defendants she said, "they were sitting in the apartment listening to me try to tell the story of what happened." Her account of the events occurring after the police arrived is in substantial accord with that of the defendants.

Considering, first, the convictions of disorderly conduct in violation of Section 193-1 of the Municipal Code of Chicago, the State's Attorney brings to our attention the fact that appeals therefrom are not properly before this

because defendants' Notice of Appeal failed to designate the City of Chicago, plaintiff in the disorderly conduct proceedings below, as party-appellee, and because no Notice of Appeal was given to the city. The defendants contend that as an Assistant State's Attorney conducted the prosecution for the city, service of the Notice of Appeal upon the State's Attorney was adequate.

While a suit to recover a penalty for violation of a city ordinance is quasi-criminal in nature (Wiggins v. City of Chicago, 68 Ill. 372; Village of Maywood v. Houston, 10 Ill. 2d 117, 139 N.E.2d 233) it is civil in form and the provisions of the Civil Practice Act apply. City of Decatur v. Chasteen, 19 Ill. 2d 204, 166 N.E.2d 29; City of Chicago v. Lewis, 28 Ill. App. 2d 189, 171 N.E.2d 70. Appellate Court (First District) Rule 5(2) (a) (Supreme Court Rule 33) sets forth the required form and contents of a Notice of Appeal in civil cases and provides that it shall designate the parties in the same manner as in the trial court, adding the further designation "Appellant" and "Appellee."

Additionally, the Assistant State's Attorney was not acting for the State's Attorney when he undertook to prosecute the case for the city and was exercising no duty required of him in his capacity as Assistant State's Attorney. Notice to the State's Attorney therefore cannot be considered notice to the city, which has not appeared in the proceeding. The failure of defendants to designate in their Notice of Appeal the city of Chicago as appellee and the failure to give notice to the

city was therefore fatal to their appeals on that point, and we do not pass upon the merits of their contentions in that respect.

As to the convictions on the charges of battery, defendants contend that they were charged pursuant to that section of the statute defining that type of battery which requires a showing of bodily harm, and no evidence of injury to the officers was adduced at the trial. The statute (Ill. Rev. Stat., ch. 38, § 12-3(a) (1965)) provides:

> "Battery.] A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual."

Defendants were charged in the language of the statute with having "knowingly and intentionally without legal justification caused bodily harm to the complainant." These charges were clearly within the scope of § 12-3(1) above, and inasmuch as there is no proof of bodily harm to the officers, the convictions on the charges of battery must be reversed.

Remaining for consideration are the convictions on the charges of resisting a peace officer. The statute provides that one is guilty of the above offense if he "knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity...." (Ill. Rev. Stat., ch. 38, § 31-1 (1965).) A related section of the Criminal Code further provides that a private person is not authorized to use force to resist an arrest which he knows is being made by a peace officer, even if he believes the arrest is unlawful and the arrest is in fact unlawful. (Ill. Rev. Stat., ch. 38, § 7-7 (1965).)

Defendant Herbert Wright argues that even accepting the testimony of the police officers that he shoved them, this occurred before the officers attempted to place him under arrest and before they would have been justified in doing so. When the officers actually undertook to arrest him, he submitted and offered no resistance. There is no basis for the finding of guilty on this charge.

As to defendant Irene Wright, the evidence on behalf of the State is that she started to hit and kick the officers when they were in the act of placing her husband under arrest and that her continued resistance necessitated carrying her out of the apartment and down the stairs. This is sufficient to support her conviction on the charge of resisting a peace officer.

Defendants argue that this court need not accept the testimony of the officers as true, and that the evidence favorable to them, presented by three witnesses, is sufficient to create a reasonable doubt as to their guilt. The trial judge, sitting as a trier of fact, believed the testimony of the State's witnesses rather than that of the defendants, and it is well established that his judgment will not be reversed by a reviewing court on the basis of the relative credibility of witnesses. People v. Lucky, 21 Ill. 2d 501, 173 N.E.2d 432.

The appeals from the judgments for disorderly conduct are dismissed. The judgment against Irene Wright for resisting a peace officer is affirmed.

The judgment against Herbert Wright for resisting a peace officer is reversed. The judgments on the charges of battery against both defendants are reversed.

Judgments affirmed in part
and reversed in part.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

75 I.A. 342

50371

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE WILLIAMS, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

After a bench trial, defendant was found guilty of the offenses of aggravated battery and of burglary. He was sentenced to 10 to 20 years and 15 to 25 years respectively, the sentences to run concurrently.

On the evening of November 12, 1962, the assistant pastor, in charge of the rectory of a Catholic Church, found a stranger in the building, who had a knife in each hand. After a struggle, the stranger escaped. Later, the clergyman found he had a knife wound on his arm, and that $1100 in currency was missing. Through police photographs shown to the clergyman, defendant was tentatively identified. He was arrested on January 25, 1963. On January 31, 1963, while with a police officer outside of the Felony courtroom, the clergyman identified defendant as the man who assaulted him.

The issues on appeal are whether the evidence established (1) identification; (2) ownership of the money allegedly taken; (3) the corpus delicti of the offense of theft as charged in the burglary indictment; and (4) that defendant entered the building with intent to commit theft.

As to the identification of the defendant, the complaining witness, the Reverend Alexander Baranowski, an ordained Catholic priest of the Archdiocese of Chicago, testified that on the night of the occurrence he saw a strange man in the rectory; that he

grabbed the man from behind, and that they struggled. The stranger turned toward him with a hunting knife about 5 or 6 inches long in each hand. Father Baranowski then retreated. When he first saw the man, the lighting conditions were not good--"However, when we got down and I accosted him on the second floor, there was about 150 watt bulb hanging on a ceiling fixture, probably two and a half feet above my head. * * * [W]hen he turned and flashed out at me, I was probably closer to him * * * about three feet away. * * * The man who robbed the rectory that night and who assaulted me, and whom I am identifying as Mr. George Williams, sitting there, and I accuse him as the one that I met that night."

The complaining witness further testified as to his initial selection of police photographs on November 13, 1962. "[A]t that time, I made a tentative identification. It was an old picture of a gentleman by the name of George White. * * * [T]hat man is George Williams, alias George White." On January 9, 1963, he was shown a group of photographs of eight men, and "I picked a very recent one of George Williams."

He also said he was in a court corridor with Officer Zyskowski when he saw the defendant come out of a crowded elevator, and "I immediately pointed him out to the officer."

Police Officer Zyskowski testified that he was assigned to the instant case during November and December, 1962, and January and February, 1963. He identified People's Exhibit 1 as one of seven photographs shown to Father Baranowski on January 9, 1963, of which Father Baranowski selected one and said, "This is the man." Also, that on January 31, 1963, while he was standing in the rear of the Felony courtroom, Father Baranowski pointed to George Williams and stated he was the man who assaulted him. Officer Zyskowski

testified that the first photograph, which was used for the tentative identification, had been destroyed about a year before the trial.

Defendant contends that the identification was insufficient because (1) the witness failed to see a scar at three feet which he was able to describe in the courtroom at six feet; (2) he estimated the weight of the stranger at 160 pounds, whereas the trial weight of the defendant was 138 pounds; (3) there was no adequate opportunity to observe the assailant; (4) the identification of defendant was "tentative" on the first photograph and "positive" on the second, and "it is evident that the identification of the accused from the second photograph was prompted by the witness' recollection of the first photograph"; and (5) "the identification of the accused at the trial by the complaining witness was not an independent identification" because of the familiarity with the two photographs and because "the complaining witness had become accustomed to meeting and recognizing the defendant in person on several occasions before trial."

Defendant's authorities include People v. McGee, 21 Ill.2d 440, 173 N.E.2d 434 (1961), where the court said (pp. 444-445):

> "Where the conviction of a defendant rests upon identification which is doubtful, vague and uncertain, and which does not produce an abiding conviction of guilt, it will be reversed. * * * [A] searching analysis of the evidence reveals that none of the identity witnesses had more than a fleeting view of the intruder and even then not under particularly favorable conditions. None of the witnesses ever claimed to have a satisfactory view of the intruder's features."

On this contention, defendant also cites Palmer v. Peyton, 359 F.2d 199 (4th Cir.) (1966), where the court said, in reversing the conviction (p. 201):

> "The opportunity for suggestion inherent in the procedure used to secure this identification is manifest. * * *
>
> "Any identification process, of course, involves danger that the percipient may be influenced by prior formed attitudes * * *. Where the witness bases the identification on only part of the suspect's total personality, such as height alone, or eyes alone, or voice alone, prior suggestions will have most fertile soil in which to grow to conviction. This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect.
>
> "To alleviate the effect of such influences upon a complaining witness, a line-up is generally regarded by police authorities as essential."

The State argues that the identification supplied by the complaining witness was positive, convincing and unshaken by cross-examination. Cited is People v. Miller, 30 Ill.2d 110, 195 N.E.2d 694 (1964), where the court said (p. 113):

> "We feel that the failure of Madison Clark to mention defendant's scar and Edrice's failure to notice it do not create a reasonable doubt of his guilt. Precise accuracy in describing facial characteristics is unnecessary where an identification is positive. (People v. Prochut, 27 Ill.2d 298.) We have often held that the testimony of one witness alone, if positive and the witness credible, is sufficient to convict even though the testimony is contradicted by the accused."

We conclude the identification here was positive and sufficient to support the conclusion of guilt beyond a reasonable doubt. Although defendant argues, "The record shows the witness to have been overly zealous in his accusations and anxious to maintain his commitment to the identification of the accused; he showed that he was not a credible witness," we think the record demonstrates that the complaining witness was quite circumspect before he positively identified the defendant as his assailant. As said in People v. Jenkins, 24 Ill.2d 208, 181 N.E.2d 79 (1962), at p. 210:

> "The question of the weight of the evidence was for the trial judge who heard and saw the witnesses and who was, therefore, in a much better position to determine which witness was worthy of belief than we would be from an examination of the record."

We find no merit to the contention of lack of identification beyond a reasonable doubt.

Defendant next contends that the indictment alleged that defendant committed the offense of theft of $1100, "the property of the Catholic Bishop of Chicago, a corporation sole." The complaining witness testified as to finding $700 and $400 missing but did not testify as to who owned it. From this defendant argues, "The State failed utterly to prove ownership of any kind. Such failure is * * * fatal to a judgment of conviction and * * * may be raised for the first time on appeal."

In People v. Walker, 7 Ill.2d 158, 130 N.E.2d 182 (1955), it is said (p. 160):

> "The failure to prove a material allegation of an indictment beyond a reasonable doubt is fatal to a judgment of conviction, and the question may be raised for the first time upon review."

and on p. 161:

> "Where an indictment charges an offense either against persons or property, the name of the person or property injured, if known, must be stated, and the allegation must be proved as alleged."

As to this contention, the State points out that a stipulation was entered into by defendant that the rectory in question was the "property of the Catholic Bishop of Chicago," a corporation, and doing business in the State of Illinois, and argues that on November 12, 1962, Father Baranowski, on duty alone and in his capacity as assistant pastor, was "completely in charge of the parish" and, as such, the stolen funds were in his possession.

Also, there was no reference by the witness to any of his personal property being taken.

From this we think it can be fairly inferred that the care, custody and control of the stolen funds rested with an agent (the assistant pastor) of the corporation named in the indictment. In a prosecution for theft, proof of special ownership, or interest, or possession of the property, is sufficient as against the defendant charged with a larceny of the property. (People v. Dunsworth, 323 Ill. App. 470, 474, 56 N.E.2d 52 (1944). See, also, People v. Steenbergen, 31 Ill.2d 615, 203 N.E.2d 404 (1964).) We find no merit to this contention.

Defendant next contends that the State failed to prove the corpus delicti of the crime of theft, in that "there was no testimony showing that other agents of the corporation had not lawfully taken the money," and that "the money allegedly taken was not found in the possession of the accused, and no witness saw the accused take the money."

In the instant case, the testimony of Father Baranowski proved a breaking and entering into the rectory and the loss of funds, and he identified defendant as being illegally in the rectory at the time of the occurrence. "Circumstantial evidence is legal evidence and may be resorted to for the purpose of proving the corpus delicti as well as to connect the accused with the crime." (People v. Gawlick, 350 Ill. 359, 362, 183 N.E. 217 (1932).) In People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953), it is said (p. 519):

> "It is not essential that the corpus delicti shall be established by evidence other than that which tends to connect the accused with the crime. The same evidence may be used to prove both the existence of the crime and the guilt of the defendant. The test is whether the whole evidence

> proves the fact a crime was committed and that the accused committed it."

We find the corpus delicti was sufficiently established.

Defendant's further contention that the evidence fails to prove that defendant entered the building with the intent to commit theft is also without merit. The evidence identified the defendant as the stranger who was found in the rectory, and the loss of funds was discovered immediately thereafter. Defendant's unlawful entry into the rectory was not purposeless and, in the absence of other proof, it is a fair inference from his conduct that theft was his purpose. (People v. Franceschini, 20 Ill.2d 126, 130, 169 N.E.2d 244 (1960); People v. Gooch, 70 Ill. App.2d 124, 131, 217 N.E.2d 523 (1966).) As said in People v. Owens, 23 Ill.2d 534, 538, 179 N.E.2d 630 (1962):

> "The trier of the fact is 'not required to search out a series of potential explanations compatible with innocence and elevate them to the status of a reasonable doubt.'"

For the reasons given, the judgments of the Criminal Division of the Circuit Court of Cook County are affirmed.

AFFIRMED.

KLUCZYNSKI, P.J., and BURMAN, J., concur.

Abstract only.

75 I.A. 2 346 (1)

50833

BRUNSWICK ENGINEERING, INC., an Illinois corporation, Plaintiff-Appellee, v. ATLANTIC POLISHING MILL, INC., an Illinois corporation, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued on a contract to recover money expended for "shop labor and non-returnable material." Defendant answered the complaint, alleging fraud, and counterclaimed. After a nonjury trial, judgment for $13,035.99 was entered for plaintiff, and the court found against defendant on its counterclaim.

On appeal, defendant's principal contentions are that: (1) the transaction is subject to the provisions of the Uniform Sales Act; (2) plaintiff committed breaches of warranty; (3) the receipt of the shipment did not constitute "acceptance" within the meaning of the Uniform Sales Act; and (4) defendant should have been permitted to amend its pleadings after judgment to conform to the proofs.

Plaintiff is an Illinois corporation engaged in the business of designing and building tools, dies and fixtures for manufacturers. Defendant is an Illinois corporation engaged in the business of polishing stainless steel and ferrous and non-ferrous sheets for fabricating.

On June 16, 1959, the plaintiff and defendant executed a contract, the preamble of which contained the following:

> "Whereas, Atlantic desires to 'automate' its polishing operations; and
>
> "Whereas, there is no existing equipment designed to effect such automation; and

"Whereas, Brunswick has represented that it can design, fabricate and deliver equipment which will completely 'automate' Atlantic's polishing operations."

The contract also contained the following provisions:

"Now, Therefore * * *

"1. That not later than March 1, 1960, Brunswick shall deliver to Atlantic and install in Atlantic's plant all handling devices and equipment which may be required completely to automate Atlantic's existing facilities for the polishing of ferrous and non-ferrous sheets. * * *.

"2. That Atlantic shall pay Brunswick for all of the automating equipment herein contemplated, the sum of Thirty-One Thousand Dollars ($31,000.00), F.O.B. the Brunswick plant. Before final acceptance of the equipment by Atlantic, Brunswick shall have the option of making any necessary changes in the equipment at Atlantic's plant or returning said equipment to Brunswick's shop, at Brunswick's expense. The sum of Thirty-One Thousand Dollars ($31,000.00) shall be paid in the following manner and shall be undertaken and completed in the following sequence:

Sequence of Production	Payments	
	When Brunswick is ready to commence construction	Upon completion of construction by Brunswick and acceptance or approval by Atlantic
Station 4	$2,500.00	$2,500.00
Station 2	$1,000.00	$2,500.00
Station 7	$2,000.00	$3,000.00
Station 5	$ 500.00	$1,500.00
Stations 1 and 6	$ 500.00	$1,000.00
Station 8	$ 500.00	$1,000.00
Station 3	$ 500.00	$1,000.00

"The balance of the said purchase price, to wit: Eleven Thousand Dollars ($11,000.00) shall be paid by Atlantic to Brunswick when all the said automating handling equipment shall have been fully installed in Atlantic's plant and shall be operating in accordance with specifications. In the event that any of the said stations upon completion is found unacceptable by Atlantic, it may at its option terminate this agreement by giving ten days notice in writing to Brunswick of its intention to terminate. Upon the expiration of the said ten day period, this agreement

> shall become null and void. All monies for shop labor and non-returnable material expended by Brunswick to the date of termination of this contract shall become immediately due and payable. Until Station 4 has been accepted by Atlantic, none of the subsequent stations is to be commenced by Brunswick. Neither party thereto shall have or possess any further rights thereunder except such rights as may accrue to them or either of them under the provisions of paragraph 4 below.
>
> " * * *
>
> "5. That Brunswick warrants that it shall make delivery and installation of the said automating handling equipment not later than March 1, 1960, regardless of whether a profit or loss shall be realized by reason of the design and production of the said equipment, except for strikes, fire, or causes beyond Brunswick's control."

Two witnesses testified for each side. Milton B. Field, president of plaintiff, explained the workings of the station and identified job tickets which showed the hours worked on the project. He testified that Stations 3 and 4 were constructed by Brunswick and delivered. Station 4 was found to be the most difficult portion of the job. It took longer to construct than was expected, and it was delivered on May 12, 1961. Part of the delay in completing Station 4 was due to defendant's request that Station 3 be constructed first. Another delay was due to other work done at the request of defendant, which took about six months or so and was paid for separately. In a letter to plaintiff, dated April 25, 1960, the president of defendant referred to the completion and delivery date of March 1, 1960, and requested that plaintiff "call me or drop me a note as to how far along you are with this work, and how soon we can expect completion of the contract."

Over one hundred tests were made while Station 4 was on Brunswick's premises, and it was completed, assembled and operating satisfactorily while there. Mr. Rubin Chaplik, a representative of

defendant, was present at many of the tests, and "he brought his wife in once to show her, he was so proud of it."

After the delivery of Station 4 on May 12, 1961, and under date of August 12, 1961, defendant sent plaintiff the following letter:

> "Reference is made to contract entered into June 16, 1959 pertaining to equipment to be used in our polishing operations.
>
> "Because of your failure to deliver as provided in contract above referred to, we do hereby elect to terminate said contract, and we look to you for damages for said breach."

Plaintiff subsequently and under date of September 12, 1961, sent its invoice to defendant for $13,035.99, being its "Charges for labor and material due and owing as of this date, pursuant to termination of Contract by Mr. Sam Chaplik, President of Atlantic Polishing Mill, Inc., for the building of automation equipment for Atlantic Polishing Mill, Inc."

Plaintiff's second witness was its secretary, who identified time records and job tickets for the hours worked on Station 4, which were received in evidence without dispute.

Rubin Chaplik, an officer of defendant, testified he attended "several dozen tests" of Station 4--the "last test I attended was conducted about the beginning of the year 1961." He denied that he ever told Milton Field that he was pleased with the results of the tests of Station 4--"Station four, in my opinion, did not ever satisfactorily operate." On cross-examination, he testified there was no correspondence with plaintiff concerning Station 4 subsequent to May 12, 1961, and prior to August 12, 1961. Station 4 was not tested after it was delivered. Leonard Field was advised it was unacceptable, and the letter of August 12, 1961, was written

because Field repeatedly promised to take the station back and finish it.

Defendant's president, Samuel Chaplik, testified that during 1960 and 1961, he visited plaintiff's plant and witnessed tests of Station 4, and it did not perform satisfactorily.

After final arguments, the court denied defendant's motion for "leave to file its Second Amended Answer and its Amended Counterclaim herein to conform the pleadings to the proofs," and in so doing remarked, "The defense was fraud, and the original case was tried on a different theory. I think counsel--toward the end of the case, I think counsel for the defense may have been aware he wasn't establishing his defense, and there were a lot of statements by counsel as to a breach of warranty, etc." The court asked whether that evidence was introduced to support this amendment. "I pointed that out to counsel, in the course of the trial, repeatedly, that the defense here was fraud. * * * [C]ounsel said, 'Wait and we will prove our defense.' * * * Your motion is for leave to file the amendment at this time, after judgment, and will be denied."

Initially, defendant contends that the transaction was governed by the Uniform Sales Act (Ill. Rev. Stat. 1959, Ch. 121-1/2, §§ 1-77), and that "the Seller failed to 'deliver' and the Buyer never 'accepted' delivery within the meaning of the Act. Legal liability accordingly as against the defendant was at no time effectively created and imposed."

In support of this contention, defendant cites Sterling-Midland Coal Co. v. Coal Co., 334 Ill. 281, 165 N.E. 793 (1929), where it is said (p. 291):

> "All contracts are presumed to have been entered into not only with reference to the general customs and usages of the trade, but with reference to the provisions of the statutory law applicable thereto, and when not negatived it must be held that it is one of the understandings of the parties to the contract for sale that sections 15 and 16 of the Uniform Sales act will apply."

We agree with plaintiff that the Act does not apply to the contract because in its entirety it is self-containing and negates the remedies provided in the Act. It is an agreement to design and fabricate equipment to effect automation, for which there was "no existing equipment." The parties negotiated and prepared drawings prior to the execution of the contract, and defendant was familiar with the nature of plaintiff's business, plant and personnel. The machinery was to be manufactured especially for defendant on its order subject, upon completion, to being "found unacceptable by Atlantic." Its express terms "negatived" the application of the Uniform Sales Act and excluded all implied warranties. The trial judge was correct in determining the legal effect of the contract from its context. (Sterling-Midland Coal Co. v. Coal Co.)

Defendant next contends that plaintiff committed breaches of warranties in its failure (1) to design, fabricate and deliver equipment which would completely "automate" defendant's polishing operations; and (2) to deliver said equipment on the date fixed by the parties in their contract or within a reasonable time after an extended date.

The evidence supports defendant's contention that plaintiff failed to design and fabricate equipment acceptable to defendant, but defendant's remedy was to terminate the contract and pay for work and material. The evidence shows that plaintiff's delay in

delivering was impliedly consented to by defendant's participation in numerous tests of Station 4. Further, we agree with defendant's contention that the delivery of Station 4 was for test purposes, and "receipt of such shipment does not constitute 'acceptance.'" Although the record indicates defendant did not test Station 4, nevertheless defendant found it unacceptable and elected to terminate the contract under date of August 12. Although plaintiff represented in the contract that it could fabricate and deliver equipment sought by defendant, it is a reasonable inference from the terms of the contract that defendant did not rely upon this representation to any extent, because the contract was so drafted as to permit defendant to terminate it if defendant was not satisfied and found "unacceptable" any of the stations. In the event of the exercise of its option to terminate, defendant was only required to pay for shop labor and non-returnable material, and "neither party thereto shall have or possess any further rights thereunder."

Defendant has not introduced any evidence to controvert the evidence of plaintiff as to its expenditures for shop labor and material. It has relied entirely on its assertion that plaintiff is not entitled to damages in any amount, and that "defendant, in agreeing to pay plaintiff 'all monies for shop labor and non-returnable material' expended by the plaintiff in the event of termination must have contemplated the delivery of a mechanism which was 'completed' in the sense that it functioned." This premise is not supported by the evidence. Both witnesses for defendant testified they saw it function, but the "sheets" that came out of the machine were not acceptable.

In conclusion, we agree with the trial court that this was

not the sale of a "commodity," but a contract to "design and manufacture something original," and "it was drawn up, stage by stage, if the defendants were not satisfied, they could call a halt and finish the contract, but they provided that when they called a halt to it, the plaintiff would be entitled to what he put into it in work and unreturnable materials."

We find no prejudicial error in the court's denial of defendant's motion to file its second amended answer and its amended counterclaim. Defendant's evidence did not show fraud, its basic defense, nor did the evidence support defendant's other contentions heretofore discussed by this court.

For the reasons given, the judgment is affirmed.

AFFIRMED.

KLUCZYNSKI, P.J., and BURMAN, J., concur.

Abstract only.

75 I.A. 2 346 (2)

50667
50955

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
ANGELO FERRARA,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY
COUNTY DEPARTMENT
CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Angelo Ferrara was tried with Robert Brown for the burglary of a clothing store. Both men were found guilty by a jury and were sentenced to two to six years in the penitentiary. Robert Brown does not join in this appeal.

About 5:00 A.M. on October 12, 1964, Chicago Police Officers Dale Marino and Edward Croke were cruising in a squad car on the near north side of Chicago when they received a radio communication of a burglary in progress at Brittany Limited, a retail store, at 625 North Michigan Avenue. They proceeded to that address and observed two men, later identified as Ferrara and Brown, immediately in front of the store and fleeing on foot. One of the two men threw a bundle under or behind a 1956 Ford Station Wagon parked some 20 to 25 feet from the store. The men fled in an easterly direction toward Lake Michigan pursued by the officers in their squad car. The chase covered a distance of some six blocks, involving alleys, streets and a parking lot, and the men were apprehended after they crossed Lake Shore Drive and had leaped a seawall at the edge of the lake. Apparently without interrogation, one of the men stated that they had committed a burglary. After the arrival of a patrol wagon, the men were taken back to Brittany Limited where a bundle of clothes was found in the store vestibule and the vestibule window broken. A second bundle of clothes was found in the area of the Ford Station Wagon. The men showed the officers an automobile belonging to one of them parked some 20 to 25 feet from the store.

Mr. Joseph Richards, president of Brittany Limited, testified that some $2,500 worth of merchandise was missing from the store the day following the incident and identified two sport coats entered into evidence as being part of the property missing on the day in question.

The only evidence offered in behalf of the defendants was the testimony of Chicago Police Officer Frederick Yonan who questioned Ferrara and Brown after they were incarcerated. The officer testified that the defendants told him they were not involved in the burglary, but were drinking on the night in question, stopped at a coffee shop for some coffee and took a walk toward the lake to clear their heads. On motion of the State the testimony was stricken as hearsay, self-serving and not a part of the res gestae. Defendants did not testify in their own behalf.

Appellant first maintains the trial court erred in allowing the testimony of Officer Marino that one of the defendants stated after apprehension that they had committed a burglary. He argues that the statement constituted a confession and should therefore have been made available to the defendants before trial. He further contends that the alleged confession would have been grounds for a severance.

We have read the transcript of proceedings of Officer Marino's direct examination, cross-examination and redirect examination and we conclude that the statement spontaneously made by one of the defendants was an admission against interest and did not constitute a confession. The gist of Officer Marino's testimony is that one of the defendants stated they had just committed a burglary, not that they had committed the burglary for which they were being tried. An admission may contain matters tending to show the guilt of a person without constituting a confession of the crime charged. People v. Richardson, 21 Ill.2d 435; People v. Stanton, 16 Ill.2d 459.

The record further shows that defense counsel was supplied with a copy of the names of all persons who were present at the time

defendants made any written or oral statements. In his opening remarks to the jury, the assistant state's attorney commented that Officers Marino and Croke would testify concerning the statement. It further appears that defendant raised no objection to the introduction of the statement on Officer Marino's direct examination, that defense counsel extensively cross examined the officer concerning the statement, and that defense counsel, in closing argument, attempted to use the statement to impeach the officer's credibility. Finally, defendant's post trial motion failed to specify what "certain evidence" and "evidence other than enumerated" alluded to in the motion was "prejudicial and improper," as required by Section 116-1 of the Code of Criminal Procedure. Ill. Rev. Stat. 1965, Chap. 38, Par. 116-1(c). Under these circumstances, we are of the opinion that defendant has waived any objection he may have had regarding the introduction of the statement into evidence. It follows that the point raised by defendant that he might have moved for a severance had the statement been known to him before trial, is groundless and speculative.

Officer Marino testified to the statement on direct examination, at which time no objection was made. The witness was cross-examined extensively concerning the statement, resulting in a certain amount of confusion. On redirect examination the officer was asked to relate "the gist" of what had been said by the defendant making the statement for the purpose of clarifying the matter. The fact that the court allowed the witness to be led to a certain degree was in no way prejudicial to the defendants. Whether leading questions are to be allowed rests in the sound discretion of the trial court, and unless the court abuses its discretion and the questioning results in substantial prejudice to the defendant, leading questions are not grounds for reversal. People v. Brooks, 52 Ill. App.2d 473, 480. The questions complained of on redirect examination of Officer Marino were

properly allowed by the trial court.

Appellant next maintains the testimony of Officer Yonan should not have been stricken for the reason that it involved matters stated by the defendants to the witness after their arrest and therefore constituted a part of the res gestae. The statements were made a considerable length of time after the arrest of the defendants and after they had been incarcerated. The statements were exculpatory, and were not part of the res gestae. People v. Jones, 26 Ill.2d 300; People v. Carpenter, 28 Ill.2d 116.

Appellant contends that the State's evidence in no way connected defendants with the sport jackets entered into evidence and the State consequently failed to establish the corpus delecti of the crime. There is no merit to this contention. Mr. Richards, the President of Brittany Limited, identified the two jackets as being part of the merchandise stolen from the store on the night in question and the State's evidence clearly shows the defendants to have been the persons who committed the burglary.

Finally, appellant maintains that the trial court improperly refused to give defendants' proffered Instructions Nos. 1, 4 and 6 on the grounds they were repetitious. The trial court was correct on these three instructions. Defendants' Instruction No. 1 is substantially the same as People's Instruction No. 1 which was given to the jury. Defendants' Instruction No. 4 is covered by People's Instructions Nos. 7 and 9 which were given, and defendants' Instruction No. 6 is covered by People's Instruction No. 2 which was given.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

75 I.A. 2 347

50797

JOSEPH L. AUDINO,

Plaintiff-Appellee,

v.

BOARD OF APPEALS OF THE CITY OF CHICAGO: B. EMMET HARTNETT, EARL J. McMAHON, HUBERT F. MESSE, KARL M. VITZTHUM and JOHN P. KRINGAS, as Members of the Board of Appeals of the City of Chicago, JOHN P. MALONEY, Zoning Administrator of the City of Chicago, SIDNEY D. SMITH, Commissioner of Buildings of the City of Chicago, and the CITY OF CHICAGO, a Municipal Corporation,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
Defendants-Appellants.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered in favor of plaintiff, in an administrative review action, brought after defendant Board of Appeals of the City of Chicago, denied plaintiff's application for a special use permit.

On January 11, 1965, Joseph L. Audino filed an application for a special use in order to construct a two-story brick four dwelling unit apartment building in a B4-2 Restricted Service District on the premises at 5916 West Fullerton Avenue, Chicago, Illinois. On December 28, 1964, the Zoning Administrator denied the application and Audino appealed to the Board of Appeals.

On February 9, 1965, the Board of Appeals held a public hearing. The entire proceeding before the Board was as follows:

> THE CLERK: Calendar No. 62-65-S. Joseph L. Audino, 5916 West Fullerton Avenue. This is an application under Article 11 of the zoning ordinance for the approval of the location and the erection of a two-story brick four apartment building,in a B4-2 Restricted Service District.
>
> CHAIRMAN: Who is representing the applicant?
>
> JOSEPH L. AUDINO.
>
> (At which time the four witnesses were duly sworn.)
>
> CHAIRMAN: Mr. Audino, tell us why you wish a special use.

HERMAN BAROCHELLO, representing Mrs. Garbossa, 2161 North Meade Avenue. We are asking for a special use because of the fact that Mrs. Garbossa is a widow. She works in the vicinity of the area, doesn't want to move out. She bought a piece of property feeling she could put up four apartments and the zoning ordinance requires B4-2 where there is business on the first floor and apartments on the second floor. It is not a wise investment for her because I have made a research of my own. I can give you a list of stores for rent, one block west and one block east. It is obvious there is no call for business in the area. There are three new six flats across the street, built by Gateway, one on the northwest corner of Mason and Fullerton completely rented before construction was started.

MR. McMAHON: Tell us are there any vacant stores in the immediate block?

MR. BAROCHELLO: Yes.

MR. McMAHON: How many?

MR. BAROCHELLO: One

MR. McMAHON: You say several in the next block?

MR. BAROCHELLO: Yes.

MR. McMAHON: Your position is that it is uneconomical to put stores on the first floor?

MR. BAROCHELLO: Yes.

CHAIRMAN: The department of City Planning finds the proposal acceptable. They find that the application to locate and erect an apartment building with ground floor dwelling units in a B4-2 Restricted Service District, on premises at 5916 W. Fullerton Avenue, be approved provided all applicable regulations of the Zoning Ordinance and Municipal Code are complied with, particularly in regard to yards and off-street parking spaces.

MR. McMAHON: I move that we take the matter under advisement.

(which were all of the proceedings held on this date.)

In addition, the record of the Board of Appeals contains a report from the Planning Commission and a letter from Herman Barochello, whose relationship to this case is not clear. The report of the Commission, in its pertinent part, states:

Subject site is located between two store buildings with apartments above. Though there are five or six business uses in this subject block, there are also vacant lots. The same condition exists in the blocks to the east and west, while the surrounding residential area is solidly built. It would appear that there is no demand for more business uses on this street in the immediate neighborhood.

From a land use and city planning viewpoint, this proposal is acceptable.

Barochello's letter relates the existence of three vacant stores in the area of the subject property.

Defendant's theory of the case is that plaintiff failed to introduce any evidence relevant to the requirements of Section 11.10-4 of the Zoning Ordinance for the granting of a special use and that plaintiff has no interest in the subject property and thus no right to a review of the Zoning Board's determination.

Plaintiff's theory is that plaintiff has submitted sufficient evidence to permit the granting of a special use and defendant cannot raise, for the first time on appeal, matters which were not raised in the Pleadings or before the Board of Zoning Appeals.

We feel there is sufficient grounds to substantiate defendant's contention that insufficient evidence was introduced to satisfy the standards for the granting of a special use. Plaintiff argues that he has "introduced a sufficient amount of evidence to satisfy the standards for a variation. . . ." He then goes on to set forth the standards for a "variation" as recited in the Chicago Zoning Ordinance and the Municipal Code of 1961. Plaintiff is, however, seeking a "special use" and his argument that he has satisfied the requirements for a "variation" is irrelevant.

The distinction between a "variation" and a "special use" is well established. In Rosenfeld v. Zoning Board of Appeals of Chicago, 19 Ill. App.2d 447, 154 N.E.2d 323 (1958), this Court recognized the distinction, stating at page 450:

> The 'special use' power delegated to the Board of Appeals is to be applied in cases of necessity 'for the public convenience'; . . . It differs from a 'variance' in that a 'special use' is a permission by the Board to an owner to use his property in a manner contrary to the ordinance provided that the intended use is one of those specifically listed in the ordinance and provided that the public convenience will be served by the use, while a variance is a grant of relief to an owner from the literal requirements of the ordinance where literal enforcement would cause him undue hardship. Yokley, Zoning Law and Practice, sec. 134.

The standards set forth in the Zoning Ordinance for the granting of a "variation" and for the granting of a "special use" are entirely different. In regard to a "variation" the Zoning Ordinance states (Chicago Zoning Ordinance, 1965, §11.7-3):

> The Board of Appeals shall not vary the regulations of this comprehensive amendment, as authorized in Section 11.7-4 hereof unless it shall make findings based upon the evidence presented to it in each specific case that:
>
> A. The property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in the district in which it is located;
>
> B. The plight of the owner is due to unique circumstances; and
>
> C. The variation, if granted, will not alter the essential character of the locality.

The Zoning Ordinance then sets forth a list of "Authorized Variations" (Chicago Zoning Ordinance, 1965, §11.7-4) none of which would permit the construction of a ground floor dwelling in a business district, the use the plaintiff is seeking.

On the other hand, the Zoning Ordinance sets forth different standards for a "special use." It provides (Chicago Zoning Ordinance, 1965, §11.10-4):

> No special use shall be granted by the Zoning Board of Appeals unless the special use:
>
> (1) a. Is necessary for the public convenience at that location;
>
> b. Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and
>
> (2) Will not cause substantial injury to the value of other property in the neighborhood in which it is to be located; and
>
> (3) It is within the provisions of 'Special Uses' as set forth in rectangular boxes appearing in Articles 7, 8, 9 and 10; and

(4) Such special use shall conform to the applicable regulations of the district in which it is to be located.

The difference between a "special use" and a "variation" is apparent, and insofar as the plaintiff has argued that he has satisfied the requirements for a "variation" his argument is not applicable to the case at bar.

Plaintiff also argues that the Report of the Department of City Planning was enough to "justify the granting of a permit for a special use." The report states in its pertinent part:

> Subject site is located between two store buildings with apartments above. Though there are five or six business uses in this subject block, there are also vacant lots. The same condition exists in the blocks to the east and west, while the surrounding residential area is solidly built. It would appear that there is no demand for more business uses on this street in the immediate neighborhood.
>
> From a land use and city planning viewpoint, this proposal is acceptable.

There is nothing in this report dealing with the standards set forth in the Zoning Ordinance for a "special use." For example, there is nothing in the report to indicate that the proposed use is "necessary for the public convenience at that location" or that it "is so designed, located and proposed to be operated that the public health, safety and welfare will be protected," or that it "shall conform to the applicable regulations of the district in which it is to be located." The Department of City Planning fulfills a unique function, different from that of the Zoning Board of Appeals, and acceptance of a proposed use, from a City Planning view, does not mean that the use satisfies the criteria for a "special use."

The validity of a "special use" ordinance is well established and the burden is on plaintiff to satisfy the standards it imposes. International Harvester Co. v. Zoning Board, 43 Ill. App.2d 440, 193 N.E.2d 856 (1963); Kosoglad v. Zoning Board of Appeals of Chicago, 47 Ill. App.2d 216, 198 N.E.2d 216 (1964); Kotrich v. The

County of DuPage, 19 Ill.2d 181, 166 N.E.2d 601 (1960). Plaintiff has failed to satisfy this burden. He seeks to distinguish the International Harvester case and the Kosoglad case by arguing that here the "plaintiff merely seeks to put an apartment on the ground floor." This is a meaningless distinction, as the proposed use is only permissible in a B4-2 Restricted Service District as a "special use." The fact that plaintiff seeks to establish a different type of "special use" does not mean he can ignore the standards imposed by the Zoning Ordinance.

There is nothing in this record dealing with the requirements of the ordinance for a "special use." There was, therefore, nothing upon which the trial court could predicate a judgment that the decision of the Board of Appeals was contrary to the manifest weight of the evidence. The judgment is erroneous and is reversed and the cause remanded with directions to enter judgment for defendants and against plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS TO
ENTER JUDGMENT FOR DEFENDANTS.

BRYANT, P.J., and BURKE, J., concur.

49440

ANTHONY LANGO, Plaintiff-Appellant, v. DIVISION PAINT & GARDEN SUPPLY CO., a corporation, GOSHEN CHURN & LADDER, INC., a corporation, and MILO LANG, Defendants-Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This action was brought by plaintiff against the manufacturer and the distributor of a ladder for injuries received when the ladder allegedly collapsed while being used by plaintiff. Plaintiff appeals from an order dismissing one of the counts of the complaint.

Counts III and IV of the complaint are directed at the manufacturer of the ladder, Goshen Churn & Ladder, Inc., hereinafter referred to as appellee, Count III alleging breach of implied warranty and Count IV alleging negligence in the manufacture of the ladder. Appellee filed an answer to Count IV and a motion to dismiss Count III, alleging that there was no direct sale from the appellee to the plaintiff, that there was no privity of contract and that there could therefore be no implied warranty. The motion was sustained and Count III was dismissed with prejudice, the order reciting that there was no just reason for delaying enforcement of or an appeal from the order.

Plaintiff maintains the lower court was in error in dismissing Count III, on the ground of lack of privity of contract, by reason of the Supreme Court and Appellate Court decisions in the case of Suvada v. White Motor Company, (32 Ill.2d 612; 51 Ill. App.2d 318.) We agree.

Since the decisions in the Suvada cases, privity of contract between a purchaser and a manufacturer is no longer essential to sustain an action for breach of implied warranty. Suvada v. White

Motor Company, 32 Ill.2d 612; 51 Ill. App.2d 318. Privity of contract is not essential where an implied warranty is imposed by law in accordance with public policy. B.F. Goodrich Company v. Hammond, 269 F.2d 501.

Appellee, however, maintains that Count III of the complaint fails to allege in what respect, manner, or form the ladder was defective, that all the allegations contained in Count III are conclusions of the pleader and that Count III consequently does not state a cause of action against appellee. This point is raised for the first time on this appeal, appellee's motion below having had no bearing on this matter. Section 45 of the Civil Practice Act requires that a motion to dismiss must point out specifically the defects complained of and must specify wherein the pleading or division thereof is insufficient. Ill. Rev. Stat. 1965, Chap. 110, Par. 45 (1) (2). Although the motion to dismiss filed below is otherwise in good form, it failed to specify the point now urged on appeal, but relied solely upon the lack of privity of contract ground. The purpose of the requirement of specificity is based in fairness, in that it allows the party against whom the motion is directed an opportunity to correct his pleading. Central Ill. Electric Co. v. Scully, 17 Ill.2d 348. Furthermore, as was recently stated by this court in Admiral Oasis Hotel Corp. v. Home Gas Industries, 68 Ill. App.2d 297, a motion to dismiss cannot be sustained unless it specifically points out the defects complained of and an obvious companion to such a rule is that grounds not specified in the motion cannot be raised for the first time on appeal. We hold that the new point raised by appellee cannot be considered on this appeal.

The order is reversed and the cause remanded with directions to reinstate Count III of plaintiff's complaint and for further proceedings not inconsistent with these views.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BRYANT, P.J., and LYONS, J., concur.

75 I.A.2 385

V75#2

385

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEITH ROBERT ADELL, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from the conviction of the defendant of armed robbery in the Circuit Court of Cook County. On Wednesday March 4, 1964, at noon-time, Mrs. Geraldine Posner saw the defendant drive up to her home and get out of a late model white automobile. The car had a Mercury Delivery Service sign on top of it, and the defendant was dressed in a green uniform and cap. Defendant gained entrance to the Posner home by telling Mrs. Posner he was a delivery man from Marshall Field's. Once inside the house the defendant displayed a revolver and pushed Mrs. Posner into the kitchen, where he shoved her to the floor. The housekeeper, who was present, likewise was told to lie down on the floor and to keep her head down. Defendant then demanded that the victim give him her rings, which she did. He then said that he wanted her mink coat and stole. Defendant forced Mrs. Posner, the housekeeper and her son, who had come upstairs to see what was happening, into Mrs. Posner's bedroom, where she gave him her coat and stole. After pulling the telephone wires out of the wall in the kitchen, defendant left the house. On the same afternoon of the crime the victim, Mrs. Posner, went to the police station and looked through many files of pictures but failed to find anyone who matched her description of the defendant. On the next day police came to the victim's home and showed her two photographs. She identified one as being of the defendant. On March 6, 1964, just two days after the crime, the victim was taken to the police station where she viewed five men. At that time she positively identified the defendant as the man who had robbed her on March 4th. After this identification,

Michael Naples, the son of the victim, was taken to police headquarters by his mother and her husband so that he could make an identification. The boy also picked the defendant out of the line-up and identified him as the man who had robbed his mother.

At his trial, the defendant produced three alibi witnesses, whom, he contends, establish the fact that defendant was not at the scene of the crime on March 4, 1966. Jerome Bremmer, sales manager of the John Smyth store on Michigan Avenue testified that defendant had been in the store and that he had made an appointment for the defendant with E. W. Bolton at the Old Orchard store concerning an opening at that store. On cross-examination Bremmer was unable to state affirmatively that the defendant was in the store on March 4, a Wednesday, but that he could have been in the store on "Wednesday, Thursday or Friday." E. W. Bolton testified that the defendant came to the Old Orchard store on March 5th to see about a job. It was the impression of this witness that the appointment had been set-up on the same day as the interview, March 5th, one day after the robbery. Finally, Clarence Vogt, an employee of Brooks Brothers Clothiers, testified that he had lunch with the defendant on March 4th at 1 o'clock in Harding's Restaurant on Wabash Avenue. However, this witness further testified that at 1:00 in the morning on the day following the lunch engagement, defendant's wife called him to tell him of defendant's arrest. The natural import of this testimony is that the defendant and the witness had lunch not on the day of the crime, but on the day after.

Defendant contends that his conviction should be reversed for the following reasons: the State failed to prove the identification beyond a reasonable doubt because of the procedures that were used to secure the identification; the weight of the evidence establishes the alibi; and the indictment has a fatal flaw in that it did not state the

time and place of the offense with the specificity required by the statute.

In regard to the defendant's first allegation of error, the failure of the State to prove identification beyond a reasonable doubt, the law is clear that the question of the sufficiency of an identification is for the trial judge who was present to see and hear the witnesses and who was in a position to determine the weight to be given their testimony. People v. Thompson, 406 Ill. 555, 94 N.E.2d 349. It is said that this identification was not sufficient because the police led the witness into making an identification of the defendant. According to the defendant, the police accomplished this by showing Mrs. Posner only two photographs, one of which was of the defendant and by presenting defendant to her in a line-up where the men did not look like the defendant. Even if this procedure is unfair as the defendant contends; this is a matter of the weight to be accorded the evidence. People v. Thompson, supra; People v. Wilson, 1 Ill.2d 178, 115 N.E.2d 250; People v. Burts, 13 Ill.2d 36, 147 N.E.2d 281. And, in those cases where identifications as were made in this case, are considered unfavorably, there existed the additional elements of lapsed time between the crime and the identification, diversified or contradictory opinion among the witnesses, and the question also whether the identifying witnesses had seen the crime committed. People v. Thompson, supra. In this case the complaining witness testified at the trial that she saw the defendant for a full two minutes during the course of the robbery. She was able to identify defendant from a photograph on the afternoon following the crime, and was able to pick him out of a line-up on March 6, 1964. At the time of the occurrence she gave police a detailed and accurate description of the defendant. Likewise, her eleven year old son was able to clearly and unequivocally identify the defendant when the boy was shown him in a line-up. In a situation where the testimony of even one credible

witness, if positive, is sufficient to convict, People v. Wilson, supra, and where both witnesses positively identified the defendant shortly after the crime, the trial court was not in error when he relied on this identification testimony.

The defendant next contends that the evidence establishes the alibi of the defendant. Without setting forth the testimony of defendant's witnesses again, it is important to note that when cross-examined, Mr. Bremmer from the Michigan Avenue John Smyth store was unable to say on what day the defendant was in his store, and that Mr. Bolton from the Old Orchard store was of the opinion that the appointment for the defendant was made on the same day that defendant came to the Old Orchard store which was the day after the robbery. Giving this testimony its most favorable interpretation, it is still not possible to say with certainty that the defendant was in the Loop when the crime was committed. In view of the ambiguity of the testimony for the defendant the trial court did not err in according little weight to this testimony. Nor was this determination reached on the basis of a misstatement of the evidence by the prosecutor. The record clearly shows that the remarks of the prosecutor did not misstate the evidence and did not mislead the court in its determination as to the weight and credibility of the defendant's alibi evidence.

Defendant's last allegation of error is that the indictment was not sufficient because it did not state the time or the place of the crime with the specificity required by the statute. Under Section 111-3, Code of Criminal Procedure, 1963, an indictment or information charging the crime of armed robbery is not fatally defective where it alleges the crime occurred within a certain county but fails to specify the street address where the crime occurred. People v. Blanchett, 33 Ill.2d 527, 212 N.E.2d 97.

For the above reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

75 I.A. 2 394 (1)

51316

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLES BIBBS, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Charles Bibbs was indicted with John Collins under three indictments for armed robbery. Bibbs pleaded guilty to Indictment No. 62-2637. He was tried before a jury on March 5,1963, under Indictment No. 62-2638, and was tried at a bench trial on March 25, 1963, under Indictment No. 62-2639. He was found guilty under both indictments and sentenced to serve 3 to 6 years in the penitentiary on the former charge and 5 to 10 years on the latter charge, the sentences to run concurrently. Defendant has been convicted of perpetrating two separate crimes on two different occasions. Although he has filed a single appeal incorporating both convictions, we have decided to treat the appeal as if two separate appeals had been filed.

Indictment No. 62-2638. On October 19, 1962, at approximately 10:30 P.M., Chicago Transit Authority bus-driver Jack Perry, Jr., was driving south on Independence Boulevard in Chicago. Two men, later identified as defendant Bibbs and John Collins, boarded the bus and sat in the rear for a short while. Perry was then approached by Collins who held a knife at Perry's throat and announced a holdup, with Bibbs standing nearby. Money was taken from Perry, the bus was stopped at a corner and Bibbs and Collins alighted and ran through a park toward 14th Street. The robbery lasted some three minutes during which time Perry observed the faces of both Bibbs and Collins.

Some three weeks later Chicago Transit Authority detectives and a Chicago police officer arrested Collins and Bibbs on information supplied by another bus driver. The following day, Collins and Bibbs were identified by Perry at a police line-up as the men who held him

up. At the jury trial both Bibbs and Collins were identified by Perry as the assailants, and several of the bus passengers testified that the two men ran together after the robbery. Defendant Bibbs offered no evidence in his behalf at this trial.

Defendant maintains, in the appeal involving driver Perry, that the evidence does not prove him guilty beyond a reasonable doubt, that the prosecuting attorney made improper and misleading remarks in closing argument which were not based on the evidence and that defendant was precluded from effectively cross examining witness Perry.

Mr. Perry was able to positively identify both defendants at the police line-up and at the trial. Although, as defendant maintains, Perry did not give any specific details as to the features of Bibbs, it is well settled that failure to give specific details does not of itself destroy the credibility of the witness' identification. People v. McCall, 29 Ill.2d 292; People v. Tunstall, 17 Ill.2d 160. The fact that almost a month elapsed between the incident and the time Perry identified defendant Bibbs does not render his identification invalid. People v. Lawrence, ___ Ill. App.2d___, 217 N.E.2d 120; People v. Clemmon, 51 Ill. App.2d 216. The question of the weight and sufficiency of Perry's identification was a matter for the jury.

The evidence further shows that Bibbs was a part of the robbery and acted in concert with Collins. He boarded the bus with Collins, sat in a rear seat with Collins, stood near Collins in the front of the bus while Collins had a knife at Perry's neck and while the robbery progressed, ran out of the bus and through a park with Collins, and was later arrested with Collins. See People v. Richardson, 32 Ill.2d 472, 477; People v. Washington, 26 Ill.2d 207, 209.

Defendant further contends that the prosecuting attorney improperly commented in final argument that the defense attorney stated

in his opening comments that Bibbs' defense would be alibi and that Bibbs had a witness who would testify to where he was on the night in question. After reading the record in this respect we find that this was in fact stated by the defense attorney, that no further comment was made concerning this matter after defense counsel's objection, and that no prejudice resulted to defendant from the prosecuting attorney's statement. People v. Brooks, 52 Ill. App.2d 473, 481.

The final point raised by defendant in connection with the appeal involving bus driver Perry is that he was precluded from cross examining Perry, whereas it was obvious that Perry's identification of Bibbs at the police line-up was the result of the identification of Bibbs by other bus drivers who allegedly were also victims of the defendants' robberies. This matter is pure conjecture on the part of defendant. Furthermore, the record shows that defense counsel asked Perry "who was present at the line-up?"and Perry stated "other bus drivers." At that time the prosecuting attorney objected to the questioning, giving as his reason in chambers the fact that this line of questioning would lead to testimony that other bus drivers attempted to identify the defendants in connection with other bus robberies and would thereby be prejudicial to defendant. Contrary to defendant's contention, we feel that Perry's identification of him at the line-up was positive, as was his identification at trial, and that it was not a conclusion of the witness.

Indictment No. 62-2639. At approximately 11:00 P.M. on October 27, 1962, Chicago Transit Authority bus driver Eugene Johnson was driving east on Roosevelt Road in Chicago. Two men, later identified as Collins and Bibbs, boarded the bus at Springfield Avenue; Collins sat down behind the driver and Bibbs sat on the other side of the bus on a seat facing Collins. As the bus approached Independence

Boulevard Collins drew a knife, approached Johnson and announced that it was a hold-up. As the bus stopped at Lawndale Avenue, Bibbs took the money changer and Collins took other money from Johnson. The robbery lasted some four or five minutes, during which time Johnson observed Bibbs for some two minutes. The bus door was opened and the two defendants ran southward on Lawndale Avenue. At a police line-up and at the bench trial, Johnson identified both defendants as the assailants. A passenger on the bus, who observed the robbery from six feet away, also identified Bibbs as the man who took the money changer while Collins held the bus driver at knife-point.

Defendant Bibbs testified in his own behalf and offered evidence of alibi, that at the time of the robbery he was with his wife at a party. Mrs. Bibbs and another witness also testified to the same effect.

Defendant maintains in the appeal involving bus driver Johnson that the evidence does not prove him guilty beyond a reasonable doubt. Bibbs and Collins boarded the bus, each sitting very near the bus driver and across the aisle from each other. Collins thereafter held the driver at knife-point while Bibbs took an active part in the robbery by taking the money changer. Both men then got off the bus and ran down the street together. Bibbs and Collins were positively identified by Johnson and by one of the passengers as the assailants. The fact that the passenger's identification was not fully detailed does not render it invalid; furthermore, that it may have contained minor imperfections was a matter for the jury. People v. Davis, 70 Ill. App.2d 419.

Defendant offered an alibi in his defense. The fact that the trial judge chose to believe the identification testimony rather than the alibi evidence is no reason to disturb the finding that defendant had been sufficiently identified as one of the robbers.

People v. Lawrence, ___Ill. App.2d ___, 217 N.E.2d 120.

The judgment in each indictment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

NO ABSTRACTS AND BRIEFS IN CASE
NO. M-50760, NEUMANN V. ELLARS.

ATTORNEYS: Patrick J. Muldowney
175 W. Jackson Blvd.
Suite 821
Chicago, Illinois 60604
for
Appellee

&

Michael J. Guinan
39 S. LaSalle Street
Suite 1023
Chicago, Illinois 60603
for
Appellant

50760

CHARLOTTE NEUMANN, Plaintiff-Appellant, v. VERNON ELLARS, Defendant-Appellee.	)	Appeal from the Third Municipal District of the Circuit Court of Cook County, Illinois.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The plaintiff's malicious prosecution suit was disposed of in the trial court upon the granting of summary judgment for the defendant. She contends on appeal that allowing such motion was error because the pleadings presented a genuine and triable issue of fact.

The pleadings consist of the plaintiff's statement of claim and the defendant's motion for summary judgment. The statement of claim is verified; the motion is not. The defendant filed no answer to the statement of claim and no affidavits supporting the motion.

The sworn statement of claim alleges that the defendant maliciously and without probable cause charged the plaintiff with the offenses of reckless driving and the use of lewd language (under the ordinance of the Village of Schaumberg); that she was imprisoned for a period of two hours and was forced to post a bond to insure her appearance in court; that she appeared in open court and that the charge of using lewd language was dismissed, and that she again appeared in the same court and was found not guilty of the charge of reckless driving and was discharged. The claim further alleges that the plaintiff expended $1,500.00 in defending herself against the charges, suffered severe physical

and emotional distress, was hampered in attending to her business affairs for a period of five months, was held in disrepute in her community and suffered injury because of the public disgrace brought on by the false and malicious charges.

The defendant's motion for summary judgment recites that he signed three complaints against the plaintiff and that they involved a single transaction and arose out of the same facts; that the third charge was disorderly conduct; that, although the reckless driving and the lewd language charges were dismissed, the disorderly conduct charge was not and that the plaintiff was found guilty of this offense and was fined $190.00. The motion also asserts that "this Court [meaning the Third Municipal District of the Circuit Court] will take judicial notice of its own order" and that the finding of guilty on the charge of disorderly conduct constituted, as a matter of law, reasonable grounds for the arrest and prosecution of the plaintiff.

The defendant urges that the trial court's order granting the motion for summary judgment was correct because the finding of guilty on the disorderly conduct charge was a complete defense to the suit for malicious prosecution and because the order was based upon the court's knowledge that the plaintiff had been found guilty of disorderly conduct which charge arose at the same time and out of the same facts as the other charges. The record in the disorderly conduct case is not before this court. Except for the assertion in the defendant's motion, the record presented to this court reveals nothing about a disorderly conduct charge or a conviction. If the plaintiff was convicted and fined the record showing these facts should

have been introduced into evidence in this case or pertinent exhibits should have been attached to the motion. While the trial court could take judicial notice of its own record (McMillen v. Rydbom, 56 Ill. App. 2d 14, 205 N.E.2d 813 (1965)) this court cannot. We cannot take judicial notice of a record in another court unless it is incorporated in the proceeding before us. People v. Hunt, 357 Ill. 39, 190 N.E. 809 (1934). We are limited therefore, in determining whether summary judgment should have been granted, to the plaintiff's verified statement of claim and the defendant's unverified motion.

The purpose of summary judgment procedure is to determine whether there is a genuine issue of material fact involved in the case. DesPlaines Motor Sales, Inc., v. Whetzal, 58 Ill. App. 2d 143, 206 N.E.2d 806 (1965); Moore v. Pinkert, 28 Ill. App. 2d 320, 171 N.E.2d 73 (1961); James F. Goodwin, Inc., v. George W. Bowers Co., 24 Ill. App. 2d 158, 164 N.E.2d 278 (1960). In determining the right of the moving party to summary judgment the whole record must be considered. If upon the examination of the pleadings, depositions, exhibits, affidavits and admissions, it can be fairly said that there is a genuine issue as to any material fact, a motion for summary judgment should be denied. People ex rel. Sharp v. City of Chicago, 13 Ill. 2d 157, 148 N.E.2d 481 (1958). While the statute provides that a defendant may file a motion for summary judgment at any time (Ill. Rev. Stat., ch. 110, para. 57 (1963)), if no answer has been filed by the defendant to the plaintiff's complaint the court can and should consider

whether the complaint, standing alone, states a cause of action. In such a case all uncontradicted allegations made by the plaintiff must be taken as true unless there is a showing made by affidavits or other documents in the record that the allegations cannot be proved. Moore v. Pinkert, supra.

One of the necessary elements of an action for malicious prosecution is the showing by a plaintiff that the former proceeding has terminated in his favor. March v. Cacioppo, 37 Ill.App. 2d 235, 185 N.E.2d 397 (1962). In the present case we have before us the complaint which alleges that the two charges against the plaintiff were dismissed. Since no answer was filed and since there are no affidavits or other documents in the record contradicting this allegation, it must be taken as true. There is nothing to confirm the statement in the defendant's motion that the plaintiff was convicted of another charge arising out of the same activity. The court's order does not mention such a charge or such a conviction, or that the court took judicial notice of any such record. Therefore, as the case appears before this court, there are issues of material fact to be determined: whether or not there were three charges against the plaintiff; whether the charges arose at the same time and out of one transaction; whether one of these charges was disorderly conduct, and whether the plaintiff was found guilty of this offense.

These issues must be settled before it can be determined whether a conviction on a charge of disorderly conduct, under the circumstances of this case, would, as a matter of law, be broad enough in scope to constitute probable cause

for the defendant's action in prosecuting the plaintiff on the charges of reckless driving and the use of lewd language. The summary judgment is therefore reversed and the cause remanded with directions to proceed in a manner not inconsistent with the views herein expressed.

Reversed and remanded
with directions.

Sullivan, P.J., and Schwartz, J., concur.

Abstract only.

Filed 10-22-66

75 I.A. 2 412

Civil 75 F 2

No. 66-43

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In the Matter of the Estate of GLEN HOOVER, Deceased. Claims of JAMES RILEY HARGIS and ALPHA TOOMEY, -vs- MARY WEINBRENNER, Executor.	Appeal from the Circuit Court, Fourth District, Probate Division, Salem, Illinois

George J. Moran, J.

This is an appeal from the lower court's allowance of two probate claims against the estate of Glenn Hoover.

The two plaintiffs, James Hargis and Alpha Toomey, had been employees in a retail store owned and managed by the decedent. After his death, they filed individual claims against his estate for wages, based on the provisions of union contracts under which they were working. The contracts provided minimum hourly rates for straight time and time and one-half for overtime. They also provided the number of hours for which employees would be paid straight time and overtime.

Both plaintiffs testified partly on their own behalves, over the objection of the defendant. In addition, each testified on behalf of the other as to the hours which each one worked. This testimony indicated that both parties worked overtime from September, 1960, to June 15, 1962, the period for which the claim is made. The pay sheets for both employees were introduced into evidence to prove the weekly pay received by each claimant from 1959-1962. There was no evidence as to the pay rate per hour used by Mr. Hoover.

The business agent for the union testified, without objection, as an expert on the interpretation of the union contracts. His testimony consisted, in part, of the computation of hours and rates of pay which were allegedly due to the plaintiffs.

He arrived at his figures by dividing forty (number of hours) into the total weekly pay of both plaintiffs, in order to ascertain the hourly rate. He then took one and one-half this rate and applied it to the hours of overtime worked. Even though this method assumed that Mr. Hoover paid neither employee for the overtime hours that they worked, the defendant made no objection and failed to suggest any different method of computation. The lower court found for the plaintifs and allowed their claims against the estate.

The defendant first argues that the court erred in admitting the testimony of the plaintiffs in their own behalves, since such testimony was inadmissible under Ill. Rev. Stat., Ch. 51, Sec. 2 (the Dead Man's Statute). The admission of this testimony was harmless error since those matters to which each plaintiff testified on his own behalf were sufficiently established by other competent evidence to which the defendant did not object. The defendant did not claim either in the lower court or in this court that the trial court had erred in admitting the testimony of the plaintiffs on behalf of each other concerning the number of hours which each one worked.

The defendant also argues that, as a matter of law, the method of computation used by the court was "erroneous and unlawful in that it assumes that Mr. Hoover paid them nothing for the overtime hours they worked." The only testimony concerning the proper method was elicited from the business manager of the union, without obejction from the defendant. The defendant in no way introduced any alternative method of computation. Therefore, since no objection whatever was made at any time prior to the appeal, any error contained in the method used by the court was waived. Marshall v. Grosse Clothing Co., 184 Ill 421; Forest Preserve of Cook County v. Lehmann Estate, 388 Ill 416; Becherer v. Best, 219 NE 2d 371.

A trial judge sitting without a jury has the obligation of weighing the evidence and making findings of fact, and such findings will not be disturbed on appeal as long as there is some evidence in the record to support such findings. Brown v. Zimmerman, 18 Ill 2d 94. In the present case the findings of the trial court concerning the amount of wages due are supported by the evidence and will not be disturbed.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

concur:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

PUBLISH ABSTRACT ONLY.

Filed Oct 11, 1966

75 I.A.2 430 (1)

NO. 66-25

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PERL SMITH,	)	
	)	
Plaintiff-Counterdefendant-Appellant,	)	Appeal from the Circuit Court of White County, Illinois.
	)	
vs.	)	
	)	Honorable Randall S. Quindry, Judge Presiding.
LINDY L. GLOVER,	)	
	)	
Defendant-Counterplaintiff-Appellee.	)	

Goldenhersh, P. J.

Plaintiff, Perl Smith, appeals from the judgment of the Circuit Court of White County, entered upon a jury verdict finding in favor of defendant, Lindy L. Glover, on plaintiff's cause of action for personal injuries, and awarding defendant $2500.00 upon her counterclaim for personal injuries.

This suit arises out of a collision between a pick up truck driven by plaintiff, and an automobile driven by defendant. The collision occurred at approximately 7:30 A. M. on February 14, 1961, on Illinois Route 1, approximately 4 miles south of Grayville. The highway is two lane, hard surfaced, straight, level, and at the place where the collision occurred, is intersected by a gravel road. There was some fog at the time, and plaintiff and another witness, Charles Horn, testified that the visibility was 100 to 150 feet.

Plaintiff testified that he was on his way to work, driving south on Route 1, at 45 to 50 miles per hour, about 500 feet north of the intersection he turned on his left-turn signal, he slowed down to between 5 and 7 miles per hour, to permit a north bound car to pass, when his vehicle was about 20 feet north of the intersection, in its proper lane, on the west half of the road, his truck was

struck from the rear, and knocked forward and to the left, coming to rest on the shoulder, east of the pavement.

Defendant testified that she was driving south on Illinois Route 1 at about 45 miles per hour, when she first observed plaintiff's truck she was 400 or 500 feet from it, and at that time saw it slow down, she saw no turn-signal light or other light on plaintiff's vehicle, that she "began to slow down and all of a sudden he stopped, and I slammed on my brakes and slid into the back end of him". She was about two and one-half car lengths from plaintiff's truck when she put on her brakes, and does not know her exact speed at that time, but she "had begun to slow down". She further stated that when she applied her brakes, she also blew her horn, that the rear of plaintiff's truck was dirty and muddy, that the mud and dirt covered the truck's tail lights, that although the shoulder to the right of the pavement was wide enough to drive a car onto, she made no effort to turn onto the shoulder because "it was too late".

Charles Horn, called by plaintiff, testified that he arrived at the scene shortly after the occurrence, that at that time the left turn signal on plaintiff's truck was operating and he could see it at a distance of 50 to 75 feet.

Plaintiff contends that defendant's conduct, in striking the rear of plaintiff's truck, was negligent as a matter of law, and her negligence was the proximate cause of, and contributed to cause her injuries. Plaintiff argues that the judgment should be reversed and the cause remanded for a new trial on the sole issue of plaintiff's damages. Alternatively, plaintiff contends that the verdicts are against the manifest weight of the evidence, the judgment should be reversed, and the cause remanded for a new trial.

Defendant contends that the evidence as to the negligence and due care of the parties was conflicting, that the verdicts of the jury are not against the manifest weight of the evidence, and the judgment should be affirmed.

In support of his contention that defendant was guilty of negligence as a matter of law, plaintiff cites Wooff v. Henderson, 46 Ill. App. 2d 420; 197 N. E. 2d 103, Houchins v. Cocci, 43 Ill. App. 2d 433; 193 N. E. 2d 597, Barnash v. Rubovits, 46 Ill. App. 2d 409; 197 N. E. 2d 134, 136, Jirkovsky v. Elfman, 323 Ill. App. 2d 282; 55 N. E. 2d 288, Sumner v. Griswold, 338 Ill. App. 190; 86 N. E. 2d 844, and Russell v. Consolidated Forwarding Corp., 330 Ill. App. 529; 71 N. E. 2d 853. An examination of the opinions cited shows them to be distinguishable on the facts.

In the Wooff case, the evidence showed that the defendant, Martin, was stopped for some time prior to the collision, that his vehicle was not involved in the collision, and the negligence of the defendant, Henderson, was the proximate cause of the plaintiff's injuries.

In Houchins, the defendant testified that the plaintiff's car was stopped when she saw it, and the Appellate Court properly found that there was no evidence which fairly tended to support defendant's defense.

Barnash is clearly distinguishable. This case grew out of a collision in bumper to bumper Sunday night traffic on the Northwest Tollway, under conditions completely different from those in the case before us.

Jirkovsky is reported in abstract, but the fact statement set forth in the syllabus presents an entirely different situation. There the plaintiff motorcyclist had followed the defendant driver's

automobile at 15 miles per hour, for some time before the occurrence.

In Sumner there was a white light burning on the rear of defendant's wagon, and unlike this case, no evidence of a sudden stop.

In Russell the evidence was to the effect that the defendant's truck had been standing at a barricade, there is no testimony that it made a sudden stop.

Plaintiff also cites Fisher v. Allen, 334 Ill. App. 393; 79 N. E. 2d 529. This case is reported in abstract and we cannot say from the statement in the syllabus that the case is so similar to this case as to be of value as a precedent.

In Brayfield v. Johnson, 62 Ill. App. 2d 59, at page 63, this court said: "A court of review can set aside a verdict as being against the manifest weight of the evidence only when it is obvious or clearly evident that the jurors have arrived at an incorrect result. Romines v. Illinois Motor Freight, Inc., 21 Ill. App. 2d 380, 158 N. E. 2d 97 (1959). It is for the jury alone to determine the credibility of witnesses and the weight of the evidence on controverted questions of fact. A verdict based on conflicting evidence and approved by the trial judge should not be disturbed on appeal unless contrary to the manifest weight of the evidence; that is, an opposite conclusion must be clearly evident. Ritter v. Hatteberg, 14 Ill. App. 2d 548; 145 N. E. 2d 119, (1957). Manifest means clearly evident, clear, plain, indisputable. Schneiderman v. Interstate Transit Lines, Inc., 331 Ill. App. 143; 72 N. E. 2d 705 (1947)."

In Stegmann v. Zachariah, 46 Ill. App. 2d 7, at page 10, this court said: "Questions of negligence and due care are ordinarily questions of fact for a jury to decide. Questions which are composed of qualities sufficient to cause reasonable men to arrive at different results should never be determined as a matter of law. The jury is

the tribunal under our legal system to decide that type of issue. To withdraw from the jury the determination of questions of fact is to usurp its function."

An examination of the evidence leads us to conclude that the issues of plaintiff's due care and defendant's negligence were questions of fact for the jury. We cannot say that an opposite conclusion from that reached by the jury is clearly evident.

For the reasons herein set forth, the judgment of the Circuit Court of White County is affirmed.

Judgment Affirmed.

Concur: Edward C. Eberspacher

Concur: George J. Moran

PUBLISH ABSTRACT ONLY

175 I.A.2-4-30 (2)
Filed 10-12-66
Ans V75 #2

No. 65-99

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SOUTHERN COMMERCIAL and SAVINGS BANK, a corporation, Plaintiff-Appellant, vs. WILLIAM PORTER and ROSE PORTER, Defendants-Appellees.	Appeal from the Circuit Court of Madison County, Illinois

EBERSPACHER, J.

The instant litigation has arisen out of the procurement by the defendant-counterclaimants, William Porter and Rose Porter, appellees herein, of a loan in the sum of $3,936.72 from plaintiff-appellant, Southern Commercial and Savings Bank, and the purchase by said defendant-counterclaimants of a 1959 International Harvester Truck from the plaintiff-appellant. Plaintiff brought this action in the Circuit Court for the Third Judicial Circuit in Edwardsville, Madison County, Illinois, to recover the balance due it on the note admittedly signed by the defendant-counterclaimants. There was no dispute as to the execution of the note nor as to the balance owed on the note at the time suit was commenced ($1,474.33). The Porters" defense and counterclaim are based on the failure of plaintiff to supply to them a certificate of title for said truck. The trial court found the issues in favor of the defendant-counterclaimants and entered a judgment for the defendants on plaintiff's claim and for the defendants on their counterclaim in the sum of $2,462.39.

Plaintiff-appellant contends that defendants-counterclaimants-appellees failed to plead or prove that they offered to return the vehicle in substantially as good condition as when it was received by them, as is required by the law of Missouri

which appellants contend is applicable, since the sale of the truck occurred there, and the note was both made and payable there. They state that the basis of the trial court's decision was an application of the principle of law accepted by the Missouri courts and embodied in Sec. 201.210(4) of the Missouri Revised Statutes (1959) which provides as follows:

> "It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void."

In the absence of such a statute Illinois courts hold that the failure to deliver certificate of title may not be critical. Smith v. Rust, 310 Ill. App. 47, 33 N. E. 2d 723.

In Lebcowitz v. Simms, 300 S. W. 2d 827 (St. L. App. 1957), the plaintiff, vendee and maker of the consequent promissory note, sued to cancel said note and recover his down payment on said auto, some $200.00 paid by him under said note and punitive damages for a "fraudulent failure to deliver title". On appeal by the defendant sellers, the St. Louis Court of Appeals, reversing the lower court decision on procedural grounds, stated as follows:

> "The plaintiff, however, is not without a remedy, for he may repudiate the contract and recover the purchase price paid since the contract is considered executory, pending the delivery of the title. Boyer v. Garner, Mo. App., 15 S. W. 2d 893; Kesinger v. Burtrum, Mo. App., 295 S. W. 2d 605. It is, of course, incumbent upon the plaintiff under such circumstances to return or tender the car in as good a condition as he received it . . . . ."

In Matthews v. Truxan Parts, Inc., 327 S. W. 2d 28, 39 (Sp. App. 1959), a plaintiff (vendee) sued to rescind the contract of purchase of a motor vehicle trailer. Incidental to this he sought and was granted in the trial court recovery of the purchase price paid by him. On appeal the Springfield Court of Appeals quoted Kesinger v. Burtrum, 295 S. W. 2d 605, as follows:

> "'* * * it has been recognized in numerous Missouri cases that, so long as the contract of sale remains executory, i. e.,

> before assignment and delivery of a proper certificate of title (Winscott v. Frazier, Mo. App., 236 S. W. 2d 382,383), the buyer may repudiate the contract and may recover what he has paid, provided he acts within a reasonable time and returns, or offers to return, the motor vehicle in substantially as good condition as it was when he received it . ... .'"

And further on page 39:

> "We think all the essential elements necessary to state a cause of action may be fairly implied from the petition except the failure to allege the return or tender of the trailer in as good condition as when he received it. Repudiation and restitution, or offer to return, are essential elements of a cause of action of this kind. It is true that plaintiff in the case at bar in pleading the wrongful acts of defendant in making it impossible for him to tender back the possession of the trailer to defendant failed to plead that the trailer was in as good condition when the possession was taken from plaintiff by the replevin action as when received from defendant. . . ."

Burton v. Auffenberg, 357 S. W. 2d 218 (St. L. App. 1962), holds that the right of the buyer of a motor vehicle to repudiate the contract in the absence of the delivery of certificate of title, requires that the buyer must show that at the time he tendered the return of the property it was in substantially as good condition as when he received it, and that an instruction to the jury is erroneous when it fails to require the jury to find that the vehicle was in substantially as good a condition when tendered back as when the buyer received it.

Here the case was tried by the court without a jury. The complaint alleged the transaction, the amounts paid on the note, the refusal to make further payments, and prayed for judgment on the unpaid balance and reasonable attorney fees, provided for in the note. Appellees answered alleging a total failure of consideration due to the refusal and failure to furnish a certificate of title and that they had been unable to register and license the truck, resulting in its being useless to them; their counterclaim alleged their payments, the failure and refusal to deliver title, and the refusal to make any arrangements for registering and licensing, and that the truck was with the knowledge of appellants purchased for the purpose of performing hauling contracts, and had not and could not be used by them without title or arrangements for licensing. They sought recovery of the $2,462.39 which they had

paid without receiving any consideration, plus damages, and by their counterclaim tendered the truck, alleging that they had previously made tender of it to appellants.

Plaintiff appellants responded neither by motion nor answer to the counterclaim, and at no time did they deny that the vehicle was not in substantially the same condition when tendered back, as when purchased. After hearing the evidence of both parties the court entered judgment in the amount of $2,462.39, the amount appellees had paid to appellants, plus costs, against appellants, and ordered appellees to deliver the vehicle to appellants upon the payment and release of the judgment lien entered on behalf of appellees.

The determination of this case depends largely upon the facts to be found in the record. From the allegation that the truck had never been and could not be used, the court could reasonably find that it was in substantially the same condition when tendered as when purchased. The findings and judgment of the trial court in non jury cases will not be disturbed by the reviewing court, if there is any evidence in the record to support the necessary findings and judgment. In such situation, the lower court's conclusions on the facts are entitled to the same weight as a jury verdict. Brown v. Zimmerman, 18 Ill. 2d 94.

Accordingly, the judgment is affirmed.

CONCUR: /S/ Joseph H. Goldenhersh

CONCUR: /S/ George J. Moran

PUBLISH ABSTRACT ONLY

75 I.A. 2 431

Filed October 13, 1966

No. 66-41

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

GERALD M. HAMPLEMAN, ESTHER M. HAMPLEMAN AND IRL E. HAMPLEMAN, Plaintiffs-Appellees, vs. COUNTY BOARD OF SCHOOL TRUSTEES OF PERRY COUNTY, ILLINOIS et al., Defendants-Appellants, (Consolidated With) JAMES G. HEIMAN and RUTH E. HEIMAN, Plaintiffs-Appellees, vs. COUNTY BOARD OF SCHOOL TRUSTEES OF PERRY COUNTY, ILLINOIS et al., Defendants Appellants, (Consolidated With) TAMAROA COMMUNITY HIGH SCHOOL, SCHOOL DISTRICT NO. 102, PERRY, COUNTY and WASHINGTON COUNTY, ILLINOIS, et al., Plaintiffs-Appellants, vs. THE COUNTY BOARD OF SCHOOL TRUSTEES, et al., Defendants-Appellees.	Appeal from the Circuit Court of Perry County, Illinois. Honorable Robert E. Bastien, Associate Judge Presiding.

EBERSPACHER, J.

This action arises out of three separate Petitions filed before the County Board of School Trustees of Perry County, Illinois, asking that the territory therein described be detached from Tamaroa Community High School, School District No. 102,

in Perry County and Washington County, Illinois, and annexed to DuQuoin Township High School, School District No. 100, Perry County, Illinois. The petitions will be referred to as the Daucksch petition, the Hampleman petition and the Heiman petition.

The Daucksch petition was heard on August 4, 1964 and was granted by order entered August 11, 1964, and the Hampleman and Heiman petitions were heard on November 30, 1964 and were denied by orders entered on December 24, 1964. In each case a petition for rehearing was filed within 10 days of service of the order, and each petition for rehearing was denied by an order entered on May 4, 1965.

Pursuant to Sec. 7-7 of The School Code, the Tamaroa district sought review of the Trustees' order entered in the Daucksch matter, while review was sought by the petitioners in the Hampleman and Heiman matters, all under the Administrative Review Act, Ch. 110, Sec. 264 et seq. All proceedings before the Trustees were completed, and the complaints for administrative review were filed in the circuit court, previous to July 1, 1965.

Pursuant to the Administrative Review Act, Ch. 110, Sec. 272(b), the Trustees filed their answer in each of the cases, including certified copies of all petitions, orders, records and minutes, including the transcript of the evidence of all witnesses who testified at each of the hearings; except in the Daucksch case, they filed a statement to the effect that the testimony of the witnesses heard on that petition was not available, since the reporter had destroyed her notes, and attached thereto a certified copy of a letter of the court reporter who had taken the evidence, dated June 18, 1965, addressed to plaintiffs' attorney, advising that since so much time had elapsed she assumed no transcript would be ordered and had destroyed her notes.

In view of the similarity of the facts presented, the law applicable thereto, and the fact that the three separate complaints were filed in the circuit court at approximately the same time, the court, at the request of all the parties and without objection, consolidated the three cases; after hearing, the court entered a single judgment, affirming the action of the Trustees in the Daucksch case and reversing the action of the Trustees in the Hampleman and Heiman

cases. From that judgment, which ordered detachment from the Tamaroa district and annexation to the DuQuoin district, of each of the three tracts involved, this appeal has been taken. In this Court, appellants pray that judgment of the circuit court be reversed, vacated and set aside; and that we confirm the decisions and orders entered by the Trustees with reference to the Hampleman and Heiman petitions, and reverse, vacate and set aside the decisions and orders entered by the Trustees with reference to the Daucksch petition.

The next to last paragraph of Section 7-6 of the School Code provided:

> "Within 10 days after service of such copy of the order, any person so served may petition for a rehearing and, upon sufficient cause being shown, a rehearing may be granted."

That section was amended, effective July 1, 1965, by adding to the quoted language in Section 7-6, the following:

> "The filing of a petition for rehearing shall operate as a supersedeas until the board enters its final order on such petition for rehearing."

As a result, we can only conclude that the petition for rehearing in this case did not serve as a supersedeas, and cannot conclude, in the absence of a showing that the reporter was advised to preserve her notes, or being advised that the matter had not been disposed of, that there was fault in the destruction of them so that they were not available some 10 months after the hearing in which they were taken.

Appellants contended in the trial court, as they have here, that the action of the Trustees on the Daucksch petition should be reversed because there was not included in the answer the transcript of testimony which could be reviewed to determine whether or not the action of the Trustees was contrary to the manifest weight of the evidence, relying on Wauconda Township H. S. Distr. v. County Board of School Trustees, 13 Ill. App. 2d 136, 141 N. E. 2d 52. Appellees contended, as they have here, that since both parties concede that witnesses were sworn, and evidence taken, and the record shows the Trustees acted and have a full record of their action and necessary findings in the minutes and order, and since plaintiffs did not seek review of the order detaching, and here request only reversal, and

do not request remandment for further proceedings, that the administrative determination was prima facie true and correct, and that appellants not having overcome this presumption, the order of the Trustees should stand. They point out the Administrative Review Act provides that the findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct[1], and this accords with the general rule in courts of law, where the court in appeals in which evidence is not presented either by absence of a transcript of evidence, or the earlier certificate of evidence, or the absence of a proper abstract of evidence, is constrained to affirm the decision below[2].

In the Wauconda case, supra, the Trustees had allowed a petition to detach territory, and the court, on administrative review reversed the decision on the ground that no evidence was taken or preserved by the Trustees at the hearing on the petition. The Appellate Court affirmed the order of the circuit court reversing the Trustees. In so doing, in the last paragraph of their opinion the Court said:

> "But, the evidence which is required by the statute is lacking. Nowhere in the record is there to be found any reference to the swearing of witnesses, the taking of testimony or the examinagion of a witness under oath. While appellants contend that testimony was taken at the hearing, and while the order of the county board states that consideration was given to the evidence of the persons present at the hearing, an examination of the record does not bear out their contentions. Statements of persons cannot be considered as evidence. 'Matters as discussed at the previous and present meetings' cannot be considered as evidence. The record must control. Even the cases cited by appellants require that the findings have a substantial foundation in the evidence. How can this court determine whether the findings have a substantial foundation in the evidence unless the evidence appears in the record. The order and judgment of the circuit court is correct."

In that case the appellants relied on the theory that the record was prima facie true

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1. Ch. 110, Sec. 274 Ill. Rev'd. Stat. 1963

2. Citing: Packard v. Chicago Title & Trust Company, 67 Ill. App. 598, 601 where it was held that the want of a complete record goes to the jurisdiction of the court to reverse, but not to the jurisdiction to affirm; Hughes v. Board of Appeals of Chicago, 325 Ill. 109, 113 involving an administrative decision; Troy Laundry Machine Co. v. Kelling, 157 Ill. 495.

while admitting that no transcript of the testimony was taken at the hearing and that no reporter was on hand for the purpose of reporting verbatim any testimony presented to them. Here the record affirmatively shows and the parties concede, that the proceedings before the board met the statutory requirements; it affirmatively appears that witnesses on both sides were sworn and testified and that the evidence was taken by a court reporter; the maps and report of financial and educational conditions of districts included and probable effect of the proposed changes, are in the record. Appellants here, do not contend that the requirements of Sec. 7-6 of the School Code were not complied with, but contend that the trial court erroneously affirmed because the Trustees have not complied with the requirements of the Administrative Review Act[3] by failing to include in their answer "such evidence as may have been heard by it".

We find, and have been cited no cases, decided by the Supreme Court of Illinois, in which the adequacy of the answer filed by the Board of School Trustees, by reason of inability to furnish a transcript of the evidence of witnesses, has been ruled upon. Our attention has been called to the case of Strohl v. Macon County Zoning Board, 411 Ill. 559, 104 N. E. 2d 612, in which the provisions of Sec. 9(b) of the Administrative Review Act were completely ignored by the administrative body; there, instead of filing a record as required by the Act and requested by the complaint, the administrative body filed only an answer which admitted or denied the various allegations of the complaint and prayed that judicial review be denied. In that case the circuit court conducted a trial de novo, and its decree was based on the record of the trial de novo, and not on a review of the administrative record. In reversing and remanding with directions, the Court at 411 Ill. p. 565 said:

> "Section 12(1)(b) of the Administrative Review Act, (Ill. Rev. Stat. 1951, chap. 110, par. 275,) empowers the circuit court to make any order that it deems proper for the amendment, completion or filing of the record of proceedings of the administrative agency. Subparagraph (2)

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3. Sec. 9(b) provides "Except as herein otherwise provided, the administrative agency shall file an answer which shall consist of the original or a certified copy of the entire record of proceedings under review, including such evidence as may have been heard by it."

> of the same section provides that 'Technical errors in the proceedings before the administrative agency . . . . . shall not constitute grounds for the reversal of the administrative decision unless it appears to the trial court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him.' If the board failed to keep a record of its proceedings as required, we consider their failure to be beyond the scope of a technical error and that it would work a substantial injustice on appellees if the continued delay in using their property as they choose can be attributed to such failure. If, on the other hand, appellants have merely omitted to file the record, appellees are equally at fault in failing to pursue their prayer that appellants produce it and, further, in not pleading the administrative decision sought to be reviewed. The decree of the circuit court of Macon County is therefore reversed and set aside and the cause is remanded to that court to determine if a record of administrative proceedings was kept. If it is determined that none was kept, it is directed that the decision of the Board of Appeals be reversed, whereas if it be determined that the record exists, it is directed that the cause be remanded to the board with directions to complete and file it in this cause, and that judicial review in the manner contemplated by the Administrative Review Act be completed."

The quoted language indicates that in the Daucksch case the circuit court should have remanded the Daucksch case to the Trustees with directions to complete and file the record. Such order would have been complied with by again hearing the witnesses, and having their testimony transcribed and made a part of the record. Such action would likewise have required a severance of the Daucksch case from the other two cases with which it was consolidated. At no time did appellants suggest such action, and in this Court, by both the notice of appeal, and their brief, appellants seek only to have the order of the circuit court and the orders of the Trustees reversed in the Daucksch matter.

As we have heretofore indicated, the petition for rehearing did not serve as a supersedeas. The record shows that appellants' attorney either requested or consented to the numerous continuances of the petition for rehearing in the Daucksch case and thus prolonged the time for which the preservation of the reporter's notes were necessary; the record shows that the reporter who took the testimony in the Daucksch case did not take the testimony in the other two cases, and was not present at the numerous meetings in which the petition for rehearing on the Daucksch case was continued from time to time; and there is no showing that the reporter was

ever requested to preserve her notes longer than the required 35 days which appellants had in which to seek review of the order of detachment entered on August 11, nor is there showing that the reporter was ever advised of the petition for rehearing. Here the absence of a part of the evidence is explained.

Under such circumstances, and the record before us, we do not conclude that either the Wauconda case or the Strohl case are here applicable, and since no other grounds are submitted for reversal of the circuit court with reference to the Daucksch case, would invoke the statutory direction to the effect that the findings and conclusions of the administrative agency on questions of fact shall be prima facie true and correct. Where the correctness of a decision appealed from depends on evidence, and the record on appeal does not show or purport to show all the pertinent evidence on which such decision was based, it will be presumed by the reviewing court that the omitted evidence would support the decision appealed from I. L. P., Vol. 2, Appeal and Error, Sec. 715 and cases cited therein.

On administrative review, the trial court found that the orders of the Trustees denying the Hampleman and Heiman petitions were against the manifest weight of the evidence, the manifest weight of the evidence being with the petitioners therein. Appellants here contend that the manifest weight of the evidence supports the denial of the petitions, and points out that it is our obligation to examine the evidence to determine as a matter of law whether the decision of the Trustees with reference to the denial of these two petitions is supported by sufficient competent evidence. Illinois Courts have repeatedly pointed out that the Legislature has designated the Trustees as the administrative agency to hear and determine whether such petitions should be granted or denied. People v. Deatheridge, 401 Ill. 25, 81 N. E. 2d 581; People, ex rel. v. Comargo Community Consolidated School District 313, Ill. 321, 145 N. E. 154. And in matters involving discretion, the Court should not substitute its judgment for that of the Trustees. Community Cons. School Dist. 201, etc. v. County Board of School Trustees, 7 Ill. App. 2d 98, 129 N. E. 2d 43. Where the order is not supported by the evidence, or is contrary to the manifest weight

of the evidence, it is to be reversed. Wheeler v. County Board of School Trustees, 62 Ill. App. 2d 467, 210 N. E. 2d 609, 613-614.

The Hampleman petition prayed for the detachment of approximately 154 acres of land; the assessed valuation of the tract was $6,830.00. Applying the Tamaroa high school tax rate of $1.82 to the assessed valuation of the Hampleman tract, we determine that the annual tax for high school purposes on that tract would be $124.31. The Heiman petition prayed for the detachment of 20 acres; the assessed valuation of the tract was $1,900.00. Applying the Tamaroa high school tax rate of $1.82 to the assessed valuation of the Heiman tract, we determine that the annual tax for high school purposes on that tract would be $34.58. The total assessed valuation of the Tamaroa district was $4,442,733.00, so that the assessed valuation of the Hampleman tract amounts to .015% of the total, and the assessed valuation of the Heiman tract is .004% of the total.

By agreement the evidence heard on each of these petitions was to be made applicable to the other. The action taken affects the status of two high school age girls, one residing on each of the two tracts. Both were enrolled in the DuQuoin high school although residing in the Tamaroa district.

Examining the record we find that the average daily enrollment at Tamaroa high school was 76.8 pupils while at DuQuoin high school the average daily enrollment was 552.89 pupils. The DuQuoin school, to which the petitioners sought to be annexed, is a fully accredited high school and has North Central Association approval. It has a faculty of 24 teachers in addition to a full time librarian, music teacher and a principal. Its curriculum consists of the usual academic courses for a school of its size and a special program for those who excel. Half of its teachers have advanced college degrees and the school has won numerous awards and distinctions in both its vocational and academic departments. It provides a wide range of extra curricular activities in both vocational and academic fields.

The Tamaroa high school district had been organized 15 years; during that period it has only been fully accredited one year, its first; since that time it has had either only probational or conditional recognition by the State Superintendent of

Public Instruction, and had conditional recognition at the time of the hearing of these petitions. Visitation reports of the State Superintendent from 1960 through April 1, 1964, are included in the record. These disclose that neither the facilities nor curriculum are adequate for approval and point out that teacher turnover is exceptionally high, teachers are over assigned, many teaching only with temporary approval, and that there has been little stability in the administration due to the fact that during the 15 years of the school's existence, it has usually been able to retain the services of its principal only one year, and in no case more than two years. Despite the fact that the efforts of the faculty and community are commended, [illegible] their efforts, the reports specifically point out that despite the apparent willingness of the community to support a school program, "the school does not have financial ability as supplemented by state support to provide a program of quality education". The reports further point out that "it seems absolutely impossible to finance a program of education which has breadth and depth enough to meet the needs of all the students living in this district"; likewise, that there is not the competition that is needed in an educational program.

The record further shows that the only extra curricular activities provided at Tamaroa are two, both closely connected with agriculture, contrasted to some twenty covering a broad range of subjects at DuQuoin. Petitioners have testified that they desire their children to have the opportunity afforded by the broader curriculum and extra curricular activities, with the competition in learning that is afforded by the DuQuoin school, and which is denied them by the Tamaroa district. Their testimony likewise has pointed out that the children involved in these petitions are not planning to terminate their education with their graduation from high school and for their advanced education require the guidance afforded in the DuQuoin system and an opportunity to meet certain requirements in science and languages, which either are not available or are available only irregularly at Tamaroa, with no assurance of continuity during their high school career; and from this record, with little or no expectation that adequate personal or instructional and laboratory equipment will be available to them at Tamaroa.

In opposition to this the Tamaroa principal, and members of the Board of Education have testified "our area serves an agricultural area and our stress is on agriculture", as justification for an inadequate curriculum and for the lack of continuity in their educational program, and as the basis for their conclusions that the granting of the two petitions would be detrimental to the educational welfare of the pupils of the area. They have testified that the loss of less than $200.00 per year of the expected revenue from the two tracts[4] will hinder them in meeting the requirements of the State Superintendent for full accreditation, but ignore the fact that for the past 14 years with this revenue they have failed to develop or maintain an educational program that meets the full requirements of the State, or provides a reasonable educational opportunity for the children of the district. From their testimony, it is evident that they were not well acquainted with the recommendations and criticisms of the State Superintendent, they stated they had probably read them, but that they were attempting to provide as well as they could with the money they had available, and were striving for full recognition. They testified that they had 8 classrooms and 8 qualified teachers, although the last report of the State Superintendent disclosed that in April 1964 there were six areas of learning that required temporary approvals from the office of the Superintendent of Public Instruction. They testified that they felt the people would support additional tax increases, despite the fact that the State Superintendent's office had advised them in 1964 that "quality education cannot be economically and efficiently provided in a high school of this type and organization", and ignore the fact that as early as 1960 the State Superintendent's office had recommended that increasing the expenditures would be inefficient and that their best effort for education in the area would be fulfilled by

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4. Since neither of the two students have attended Tamaroa high school, but have paid tuition to attend DuQuoin, Tamaroa has received no state funds based on daily attendance of them.

attempting to keep the quality as high as they could until such time as reorganization of the district could be accomplished.

They further testified that the granting of the petitions would jeopardize their enrollment, since their attendance was near the 60 mark, at which they would become ineligible for State Aid, ignoring the fact that the children involved were not enrolled at Tamaroa, and from the testimony of petitioners, it was not intended that they would enroll there even if the petitions were denied.

Enrollment of the students from the territory, at DuQuoin, would require no additional facilities or additional teachers, although it is evident from the record that were they to enroll at Tamaroa, changes in the curriculum with the possibility of additional teachers in certain subjects to be offered would be required. From this record it could reasonably be concluded that the cost of furnishing the basic education to these two students at Tamaroa would exceed the tax revenue and State Aid which the district would receive were the petitions denied and the students enrolled at Tamaroa, and thus add to the difficulties and further lowering of the quality of education at Tamaroa.

The evidence shows the distance from the two schools and highway conditions to be sufficiently comparable, considering modern transportation practices and methods, as being of no consequence.

The thrust of the argument which has been made in this Court is the effect that there will be a financial disadvantage to the Tamaroa district if the detachments are permitted, and that the petitions should not be granted because of the personal preferences of the petitioners, since they have admitted that their business and social center is DuQuoin rather than Tamaroa, and the children involved attend DuQuoin and participate in numerous extra curricular activities there.

The loss of revenue here complained of, amounts to less than .002% of the Tamaroa district's revenue from taxes and less than 1/2 of 1% of Tamaroa's total annual income; yet this absence of tax money is relied upon by appellants as the foundation for the statement that they might lose some educational materials if the

petitions are allowed. Normally there is more variation than 1% in receipts from year to year, and here the prospective loss is less than what the variance might be, depending upon success of collection of taxes and shifting of personal property. The merits of these modest proportions of school income, cannot as a matter of law, be considered as determinative. In Board of Education, McLeansboro Twp. High School v. County Board of School Trustees, 45 Ill. App. 2d 292, 196 N. E. 2d 3 at p. 4, the Court said:

> "The cases indicate it was not the intention of the Legislature to freeze boundaries of school districts in order to prevent an increase of tax rate, and that where detachment is determined, there must necessarily be some financial loss to the school district (not all of the property owned by the persons seeking detachment was included in the detachment petition). Loss of revenue cannot be the basis for denying detachment (citing cases)".

See also School Distr. No. 6 v. County Board of School Trustees of Cook County, 48 Ill. App. 2d 158, 198 N. E. 2d 164 and cases cited therein. The testimony of the Tamaroa board members and their principal that the Tamaroa district would be financially jeopardized by allowing the detachments, and annexation to DuQuoin, does not foreclose the manifest weight of the evidence, since their opinions are without substantial foundation in the evidence. Where the educational welfare of students is involved, we are not bound to accept such opinions and are not accordingly bound to deny an order to the contrary as being supported by the manifest weight of the evidence, without regard to the facts on which such opinions purport to be based.

Likewise, the testimony of the Tamaroa board members to the effect that it was their opinion that the granting of the two petitions would adversely affect the welfare of the students in the area, is without substantial foundation in the evidence; whereas it has been definitely shown that the educational welfare of the children residing on the tracts described in the petitions, would be enhanced by the granting of the petitions.

Appellants have assumed that because petitioners admitted that DuQuoin is their natural community center, in which they transact the major part of their business, and they have a personal preference for the school at DuQuoin, that their

petitions should not be granted. While boundaries are not to be changed by the shopping, banking or school preferences, and personal preferences do not control, Oakdale Community Unit School District v. County Board, 12 Ill. 2d 190, 145 N. E. 2d, the factors of convenience to parents and students are also required to be given consideration, Wheeler v. County Board of School Trustees, 62 Ill. App. 2d 467, 210 N. E. 2d 609. Here it has been positively shown that the educational needs of the students involved, and which are not of a special, unusual or peculiar nature, have not and cannot be met at Tamaroa, but have been and are being met at DuQuoin. It was said in Burnridge v. School Trustees of Kane County, 25 Ill. App. 2d 503, 167 N. E. 2d 21,p.24:

> "But even as much or more than these considerations, is the fact that an identification with a school district in a child's natural community center will inevitably result in increased participation in school activities by the child and his parents. Such increased participation cannot but result in an improvement in the educational picture of the entire area. By the same token, an unnatural identification with a school district would have an opposite result with a corresponding loss of participation and resulting poorer educational picture. In recognition of these facts the legislature made provisions for proceedings to change the boundaries of existing districts."

We find this particularly applicable here, and conclude that where the factors of convenience, and natural association, are coupled with substantial evidence of greater educational opportunity, and the resulting enhancement of educational welfare in the entire area, that evidence of these factors contribute to the manifest weight of the evidence in support of the granting of the petitions.

Here there is little or no substantial evidence of adverse effect to educational welfare in the area by the granting of the petitions. Here the benefit derived by the affected areas clearly outweighs the detriment resulting to the losing district and the surrounding community as a whole.

From the foregoing, we can only conclude that the decisions of the School Trustees on these two petitions lacks support in the record, and are against the manifest weight of the evidence.

Accordingly, we affirm the judgment of the Circuit Court of Perry County.

Judgment affirmed.

CONCUR: /S/ Joseph H. Goldenhersh

CONCUR: /S/ Goerge J. Moran

PUBLISH ABSTRACT ONLY

FILED
OCT 13 1966
James O'Mcfaughlin
CLERK OF THE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS